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Supreme Court, U.S.
FILED

07-44 JUL 11 2007

No. OFFICE OF THE CLERK

In The
Supreme Court Of The United States

NEW WEST MATERIALS, LLC; JWR, INCORPORATED,
Petitioners,

v.

INTERIOR BOARD OF LAND APPEALS;
BUREAU OF LAND MANAGEMENT
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 2007

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QUESTIONS PRESENTED

Mineral reservations in land conveyances normally do not encompass ubiquitous materials like sand and gravel. Nonetheless, *Watt v. Western Nuclear*, 462 U.S. 36 (1983), held that lands granted under the 1916 Stock-Raising Homestead Act ("SRHA") were subject to a mineral reservation preserving gravel for the United States. *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176 (2004), reached the opposite conclusion for land conveyed under the 1919 Pittman Underground Water Act.

The 1938 Small Tract Act ("STA"), at issue here, authorized the public sale of small plots of western land, subject to a mineral reservation in favor of the United States. More than a half-century after the 1959 conveyances at issue, the Interior Department laid claim to the gravel on Petitioners' land. The Fourth Circuit held that because the STA and SRHA reservations used similar language, they should be similarly construed. Thus, Petitioners have found, and thousands of owners of western property subject to federal mineral reservations may find, that ownership of the sand and stone comprising the bulk of their land is claimed by the Government.

The basic question is whether *Western Nuclear* is the exception or the rule. We will learn the answer to that question by considering the following questions:

(1) Pursuant to its mineral reservation, does the United States own sand and gravel in lands conveyed in STA patent deeds if the sand and gravel were worthless at the time of conveyance?

(2) Did the Fourth Circuit panel err in holding that the similarity in language between the STA and SRHA mineral reservations required that the STA reservation be given the

same breadth as the SRHA reservation, notwithstanding the different purposes of STA and the SRHA conveyances?

RULE 29.6 STATEMENT

New West Materials, LLC is not publicly held; its parent company is Pulice Construction Inc.

JWR, Incorporated is not publicly held and does not have a parent company.

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PETITION FOR A WRIT OF CERTIORARI

The question whether federal mineral reservations in fee title land conveyances reserve gravel, sand and other common materials for the Government, or whether the fee owner holds dominion over those materials, has been a recurring one in this Court and in the Circuits. Questions about ownership of such common materials tend to arise long after the purchase of the land, when nearby towns expand, roads are built, and gravel, worthless at the time of conveyance, acquires commercial value. The private owner may then seek to sell the gravel – and the Government suddenly asserts that it is (and has always been) the owner.

Despite the U.S. Department of the Interior's sporadic assertions (primarily in the last half of the 20th century) of ownership of sand and gravel on certain former U.S. land, at no point throughout the last century did that agency propound a rule or give notice to prospective private purchasers of government land that their purchase of a fee simple would *not* include the common earthen materials covering their property. As shown below, an inquisitive purchaser would in fact have inferred otherwise, as a matter of common sense, and as a result of common law, and contemporaneous Interior Department legal opinions affirming that sand and gravel, not commercially exploitable, are not "minerals" under a federal mineral reservation.

The understanding that common materials are normally part of the surface estate has been unsettled by the Interior Department's broad assertion (in this case) that this Court's decision in *Watt v. Western Nuclear*, 462 U.S. 36 (1983), states a general rule that the phrase "all . . . minerals" in a federal mineral reservation encompasses common materials. The court below accepted that view. That view would extend federal ownership of common materials to virtually all land subject to a federal mineral reservation. This Court's

precedents have apparently not settled the issue for two reasons: (1) the unique land grants at issue in *Western Nuclear*, which naturally lends itself to giving that decision a limited reach, and (2) the narrow ground for decision in *BedRoc Ltd., LLC v. U.S.*, 541 U.S. 176 (2004), which has ironically reinforced the view that *Western Nuclear*'s outcome actually turned on the phrase "all . . . minerals." This issue of basic ownership should be resolved in order to provide the certainty that property owners (and prospective purchasers) have a right to expect. Because this case does not involve a statutory language distinction of the kind that provided the narrow ground for decision in *BedRoc*, this case will put the issue to rest, one way or the other.

Significantly (as discussed below), most courts addressing mineral reservations acknowledge that the word "mineral" normally does *not* include ubiquitous common materials like sand and gravel. Common materials convey with the surface estate, or else the very thing the purchaser assumes he bought will turn out not to have been conveyed at all. Indeed, Interior Department legal opinions (cited below) confirm that such materials are deemed mineral only if they have special value.

Western Nuclear unsettled the law. The narrowly split (5 to 4) Court addressed the 1916 Stock-Raising Homestead Act ("SRHA"), 39 Stat. 862, *repealed by* 90 Stat. 2744 (1976), which authorized the conveyance of enormous tracts at nominal cost for agricultural use. Agricultural use on such large tracts was compatible with concurrent extraction of sand and gravel. In light of the SRHA's purposes, the Court held that the SRHA's mineral reservation held gravel for the United States. But most cases after *Western Nuclear* had little difficulty distinguishing the SRHA from other land-

conveyance statutes, and *Western Nuclear* was largely limited to the SRHA.

More recently, in *BedRoc*, this Court declined to extend *Western Nuclear* to another land-grant statute enacted for a different purpose. The Court's opinion, and several separate opinions, were openly skeptical about *Western Nuclear*'s reasoning and result. The Court did not, however, formally overrule *Western Nuclear* or formally limit it to the SRHA. Rather, in declining to extend *Western Nuclear*'s holding to the 1919 Pittman Underground Water Act ("Pittman Act"), 41 Stat. 293, *repealed by* 78 Stat. 389 (1964). the Court rested on the narrowest ground, *i.e.*, that the wording of the Pittman Act ("valuable minerals") was different from the SRHA ("all . . minerals").

The Court's choice of the narrowest ground of decision in *BedRoc* has seemingly revived *Western Nuclear*. By resting on the language of the respective reservations, the Court has reinforced the Interior Department's theory – heretofore having little success in the lower courts – that *Western Nuclear* controls any reservation that uses the "mineral" formulation (without the qualifier "valuable").

Here, the Interior Board of Land Appeals ("IBLA"), the district court, and the Fourth Circuit panel considered the Small Tract Act of 1938 ("STA"), 52 Stat. 609, *amended by* 68 Stat. 239 (1954), *repealed by* 90 Stat. 2798 (1976). The STA language ("all minerals") is closer to SRHA language, addressed in *Western Nuclear*, than Pittman Act language, addressed in *BedRoc*. The purposes of the STA, however, providing for sale of small tracts for non-agricultural use, are unlike those of the SRHA. Nonetheless, the IBLA (2-to-1), the district court, and the Fourth Circuit panel found themselves compelled to apply this Court's ruling dealing with the most similar language. This refocus on the word

"mineral" – as if it holds the answer – has again unsettled this area of basic property law. *Western Nuclear*'s ruling, by its terms, was based on the unique *purposes* of the *SRHA*, not plain language.

The Court should settle the issue now, lift the cloud on titles to the basic substances that comprise the land in thousands of properties in the West, and make clear that *Western Nuclear* is limited to the SRHA, the specific statute at issue in that case. As shown below, this Petition presents two questions that will settle this area of law, one way or the other, either by limiting *Western Nuclear* to the SRHA, or clarifying that *Western Nuclear*'s definition of mineral states a general rule applicable to *all* land conveyance statutes.

OPINIONS BELOW

The opinion of the court of appeals, 2007 WL 446729 (4th Cir. Feb. 8, 2007), is set forth at Appendix ("App.") A, 1a-11a; the court's order denying rehearing is set forth at App. B, 12a-13a. The district court's opinion, 398 F. Supp. 2d 438 (E.D. Va. 2006), is set forth at App. C, 14a-45a. The opinion of the Interior Board of Land Appeals, 50 IBLA 126 (Dec. 2004), is set forth at App. D, 46a-80a; the IBLA's order denying reconsideration is set forth at App. E, 81a-83a.

JURISDICTION

The Court of Appeals denied Petitioners' petition for rehearing and rehearing en banc on April 13, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Small Tract Act of 1938, 52 Stat. 609 (1938), and its 1954 amendments, 68 Stat. 239 (1954), *repealed by* 90 Stat. 2798 (1976), are set forth at App. F, 84a-85a, and G, 86a-88a, respectively. Section 9 of the 1916 Stock-Raising

Homestead Act, 39 Stat. 862 (1916), *repealed by* 90 Stat. 2744 (1976), is set forth at App. H, 89a-90a. Section 8 of the 1919 Pittman Underground Water Act, 41 Stat. 293, *repealed by* 78 Stat. 389 (1964), is set forth at App. I, 91a-92a.

STATEMENT

Factual Background.

Enacted in 1938, the STA provided for the sale of small tracts of public lands for "home, cabin, camp, health, convalescent, recreational, or business" sites. App. 84a. These small parcels sold in the southwest, west and Alaska were limited to five acres and sold at appraised value, *not* granted for free or for a nominal sum. App. 84a; BLM Guide Book for Managing Existing Small Tract Areas ("STA Guidebook"), at 1-25 (April 1, 1980). In 1954, the STA was amended to expand the range of western properties available for sale and the purposes for which sales could be made. App. 86a; App. 16a.

As amended in 1954, the STA reservation of mineral deposits was as follows:

> Patents for all tracts purchased under the provisions of this act shall contain a reservation to the United States of the oil, gas and all other mineral deposits, together with the right to prospect for, mine, and remove the same under such regulations as the Secretary may prescribe.

App. 87a.

Petitioner JWR is fee simple owner of approximately 82 acres of desert land near what is now Sun City, Arizona, 20 miles from downtown Phoenix. App. 16a-17a. The property

now combines various five-acre STA parcels bought from the Government in 1959. App. 16a-17a. JWR acquired the parcels in 2000 and entered into a lease with Petitioner New West in October 2000 under which New West operated a sand and gravel extraction business on the property. App. 17a.

Sand and gravel make up the bulk of the land. Those materials had no commercial value in 1959 when JWR's predecessors-in-interest purchased the plots from the Government at the appraised fair market value. The property was too distant from any developed area, and sand and gravel far too plentiful, to allow for commercial use of those materials from the site in 1959. App. 17a, 38a. Indeed, no commercial use was made of the sand and gravel for approximately forty years following the conveyance. App. 17a.

It was not until well after metropolitan Phoenix swelled outward in the 1980s and 1990s that the possibility of selling sand and gravel from this portion of the Arizona desert emerged. And only much later, with highway construction, did the subject property become accessible, allowing the sand and gravel on this site to be put to commercial use.

Procedural History

Agency Action. On November 1, 2001, the Bureau of Land Management ("BLM"), an agency within the Interior Department, notified JWR of its claim that the sand and gravel on its land belonged to the United States. Petitioners disputed BLM's claim, whereupon BLM issued a notice of trespass. App. 19a. BLM's notice warned New West that failure to comply with the notice would "result in further action to protect the interests of the United States, which may include ... prosecution as a criminal trespass."

Petitioners appealed to the IBLA, which hears administrative appeals from BLM. 43 C.F.R. §§ 4.1(b)(3), 4.410(a). As is typical in such cases, the matter was decided on written submissions.

In a 2-1 decision, the IBLA upheld BLM's claim of trespass. App. 46a-63a. On March 23, 2005, the same split IBLA panel denied reconsideration. App. 81a-82a. The majority saw the language of the STA reservation as identical to the SRHA reservation at issue in *Western Nuclear*, and held that it "should be interpreted the same way." App. 61a. In contrast, the dissenting IBLA judge found the purposes of the STA inconsistent with an expansive interpretation of the reservation, pointing out that under the majority's view, the Government could simply enter upon the land, remove sand and gravel – and effectively prevent the property holder from using the land for any other purpose – without affording any compensation for damage to the surface estate. App. 64a-80a, 83a.

The District Court Decision. Appellants timely sought review in the District Court for the Eastern District of Virginia under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.*, and 28 U.S.C. § 1331. On cross-motions for summary judgment, the district court held that it was bound to defer to the IBLA. App. 14a-45a.

The Fourth Circuit's Decision. Petitioners timely appealed. The petitioners' appeal was supported by an *amicus curiae* brief submitted by the National Stone, Sand and Gravel Association, which highlighted the broad importance of the questions at issue in the appeal in the aftermath of *BedRoc*. The Fourth Circuit panel held that it need not resolve whether the district court properly deferred to the views of the IBLA tribunal on the legal question. App. 6a. Instead, the Fourth Circuit held that the language

of the STA mineral reservation was "strikingly similar" to that in the SRHA and that, under *Western Nuclear,* "the plain meaning of the STA's reservation commands the most expansive interpretation available under existing law." App. 8a, 9a. It also agreed with the district court's interpretation of contemporaneous statutes and decisions as being in accord with that conclusion. App. 9a. The panel also held that its conclusion furthered the purpose of the STA for the same reasons the SRHA's purpose was furthered by interpreting that statute's reservation to include gravel. App. 10a.

The panel did not address Petitioners' argument that even under Interior's own contemporaneous interpretations, and mineral law generally, common materials were never considered mineral unless they had commercial value at the time of the conveyance. A petition for rehearing or rehearing *en banc* was denied. App. 12a-13a.

REASONS FOR GRANTING THE PETITION

I. THIS PETITION SHOULD BE GRANTED TO SETTLE AN IMPORTANT ISSUE OF PROPERTY OWNERSHIP AFFECTING MILLIONS OF ACRES OF LAND: IS *WESTERN NUCLEAR* THE EXCEPTION OR THE RULE?

This Petition asks the Court to settle an important issue clouding the ownership of the basic substances that comprise millions of acres of western land. That cloud is the product of the Interior Department's assertion of ownership of sand and gravel on lands subject to a federal mineral reservation. This Court and the Circuits have failed to resolve the Interior Department's broad claims one way or the other, frequently rejecting the claim as inconsistent with the usual rule applied to the term "mineral," but sometimes accepting it, as here. This case allows the Court finally to resolve the issue not

only as it bears on the Petitioners in this case – whose title flows from the STA – but as it bears on many tens of thousands of citizens and businesses who own western lands comprised of sand and gravel, or other common, ordinary materials, conveyed to them (or their predecessors) by the United States in fee simple under various, similar land-conveyance statutes.

With respect to the STA alone, the Fourth Circuit's decision now clouds ownership of the basic grit of the land on over 230,000 acres of STA lands sold in at least 13 western states. STA Guidebook, at 1-27. But the Interior Department's theory that "mineral" should be given its broadest interpretation, and thus always reach common materials, here adopted by the Fourth Circuit, extends the uncertainty to millions of acres of land conveyed by the United States under a variety of other statutes, subject to reservations of "all minerals." The holders of those plots would likely be shocked to learn that although they were not notified by the United States at the time of their purchase, the basic material that comprises their property is not theirs at all, and the Government is free to enter to remove that material without compensation and in derogation of their own use of the property. Resolution of the issue here will thus lift (or confirm) a significant cloud on ownership to more than 42 million acres of western land (*not* counting the SRHA lands specifically addressed in *Western Nuclear*).[1]

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[1] *See* U.S. Dept. Interior, Bureau of Land Management, PUBLIC LAND STATISTICS 1983, Table 13, at p. 44 (April 1984) (listing patents issued with "All minerals" reserved as encompassing 42,023,406 acres, and noting that these "[d]ata do not include stockraising homesteads which reserved all minerals to" the United States).

In *Western Nuclear*, this Court, examining the SRHA's reservation of "all the coal and other minerals," held that in light the statute's rather unique purposes, gravel was encompassed by the word "mineral" as used in that Act. More recently, in *BedRoc*, the Court and various separate opinions (all skeptical about the result in *Western Nuclear*) declined to "extend" the *Western Nuclear* rationale to a different land-grant statute, and held that sand and gravel were not within the Pittman Act's reservation of "all the coal and other valuable minerals."

BedRoc's rejection of the Interior Department's claim by relying on a difference in language between the Pittman Act and SRHA reservations has had the ironic effect of reinforcing the Interior Department's self-interested argument that *Western Nuclear* holds that the word "mineral" or "all . . . minerals" in a reservation *in any land-grant statute* should be given its broadest possible meaning. On that theory, the Fourth Circuit *extended* the *Western Nuclear* rationale to a very different statutory scheme.

As shown below, there are two distinct ways of *distinguishing Western Nuclear*, either of which will settle the law in this area. (Rejecting these theories will likewise settle the law by making clear that *Western Nuclear* indeed states a general rule applicable to other statutes by virtue of similar language.)

1. This case can be decided by resolving a question that this Court had no need to address in *BedRoc* (having rejected the Interior Department's theory on a different basis) and which the Government concedes was not presented or resolved in *Western Nuclear*: Are common materials, such as sand and gravel, that *lack any commercial value at the time the land is conveyed*, reserved to the United States? The Tenth Circuit addressed this question in a 2003

opinion concerning a similar federal mineral reservation, finding that if sand and gravel has no value *at the time of conveyance,* it is not reserved. *See U.S. v. Hess*, 348 F.3d 1237, 1248 (10th Cir. 2003). Yet, here, despite extensive briefing (it was the lead argument below), the Fourth Circuit completely ignored it.

The Tenth Circuit had it right in *Hess*. As a matter of land law, common materials like sand, gravel, caliche, and common stone – ordinary, ubiquitous materials that often comprise a large portion of the land where found – are generally not deemed "minerals," that designation being used only when the materials have commercial value. Indeed, at the time of the conveyances at issue here, Interior's Solicitor had reaffirmed in 1956 the federal rule that common earthen materials are "minerals" only when their ready proximity to a market affords them commercial value. Thus, during all relevant times, the *Interior Department's own test* for determining whether common materials are within the scope of a federal mineral reservation turned on whether those materials had commercial value *at the time of conveyance.* The Fourth Circuit ignored this rule, presumably believing that *Western Nuclear* allowed it to be ignored. This Court should mend the disparity between the Tenth and Fourth Circuit outcomes, and restore the rule that Interior itself announced in 1956.

2. The Petition can also be resolved on a second basis, which will likewise settle the law, by making clear that *Western Nuclear* is the exception, not the rule. The controlling factor in *Western Nuclear* was not the language of the statute. "Mineral" or "all ... minerals" does not always (or even usually) encompass sand and gravel. It did in the SRHA only because of that Act's unique purposes. Indeed *Western Nuclear* acknowledged that "the

determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated." 462 U.S. at 52.

The SRHA authorized the grant of large tracts of land (typically 640 acres, or one square mile) for grazing and stock-raising. Those enormous tracts permitted the owner to use the surface for agricultural purposes without limiting the ability of others to concurrently exploit sand and gravel. Moreover, the land was virtually given away. This regime was arguably consistent with the idea that the United States did not intend for the surface owner to take title to any materials existing below the surface.

In contrast, more typical land grants like the STA contemplate surfaces uses incompatible with the notion of a reservation of the very ground on which the grantee was to work and live. The small (five-acre) plots sold under the STA could not be used concurrently for surface uses while being exploited for sand and gravel; surface disturbances associated with extraction of such widespread aggregates would overwhelm any surface use. Moreover, such parcels were not granted for a nominal fee, as under the SRHA, but *sold* to the public *at appraised fair-market value*. The type of reservation that the United States now proposes would have rendered the land un-saleable for its intended purposes at the time: It is difficult to imagine someone purchasing small plots with the understanding that the rock and gravel of which it was composed was actually retained by the Government and could be seized by the Government at any time, without compensation to the owner for disruption and destruction of surface developments wrought by that extraction.

In sum, this Court should settle this area by choosing one of the two grounds of decision presented by this case to distinguish *Western Nuclear* (or by adopting the Fourth Circuit's approach and putting any claim that gravel is not a mineral forever to rest). Landowners who own property subject to federal mineral reservations deserve a clarity of title that is currently lacking in light of *Western Nuclear* and *BedRoc*. The issue is clearly for this Court to resolve. It arises from this Court's decisions and Congress cannot be expected to address it. This case should do so.

II. SAND AND GRAVEL ARE NOT RESERVED "MINERALS" UNLESS THEY HAVE ECONOMIC VALUE AT THE TIME OF CONVEYANCE.

The district court correctly found that "*the subject land was essentially desert*" when conveyed, App. 17a (emphasis added), and that *"[a]s the record reflects, there was no significant local market for sand and gravel in the Arizona desert in 1959."* App. 38a (emphasis added). In light of the rule that the word "minerals" in a mineral reservation does not encompass common materials *that are not commercially valuable when the subject land was conveyed*, those findings should have been determinative.

As the Government conceded in *BedRoc*, this Court did not address this issue in *Western Nuclear*, and this Court did not reach the issue in *BedRoc* (though it was there presented). This Court's acknowledgement of the rule will settle this area of the law.

* * *

All cases in this field have as their starting point a universally accepted premise: The "word 'minerals' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light

upon its signification in a given case." *Western Nuclear*, 462 U.S. at 42-43 (quoting *N. Pac. Ry. Co. v. Soderberg*, 188 U.S. 526, 530 (1903)). "Mineral" could encompass virtually all of any conveyance of land. *See id.* at 43. No case has suggested that a "mineral reservation" actually includes all inorganic materials, as it might if read literally. *E.g.*, *Andrus v. Charlestone Stone Prods. Co., Inc.*, 436 U.S. 604 (1978) (water, though inorganic, is not a mineral). Thus, literalistic plain meaning without regard to context and the common law cannot carry the day. To the contrary, in connection with conveyances, "mineral" always means something less than "all inorganic substances." It would be "absurd" to equate the legal meaning of "mineral" with the scientific meaning because "the owner of the surface estate would be left with nothing." *Western Nuclear*, 462 U.S. at 43; *see also Soderberg*, 188 U.S. at 530.

On the one hand, some substances always fall within a mineral reservation – rare, precious metals, and other metals and substances that are intrinsically valuable like zinc, copper, uranium, oil, gas, coal and others, are *always* understood to be subject to a mineral reservation.

On the other hand, ubiquitous inorganic earthen materials – sand, stone, gravel, rock – are normally *not* treated as mineral for purposes of mineral reservations. Common materials are subject to a different rule, rooted in colloquial and conventional understandings of the word "mineral." At common law, such ordinary materials are not regarded as mineral unless they have site-specific economic value.

The common law rule is practical. The purchaser for value of a property comprised of rocks and stone, gravel, and sand – if not alerted to the contrary – would think it his. He would be surprised to learn that all the rocks and stone,

gravel, and sand he sees on his land actually still belong to the seller. In contrast, the same purchaser, buying property where stone was being extracted and sold on adjacent parcels, *i.e.*, where it had evident commercial value, might expect that if he were to acquire such commercially valuable material, it would be reflected in the price and the deed. Thus, the determination whether sand and gravel pass with the fee title, notwithstanding the existence of a mineral reservation, is resolved by determining whether the sand and gravel had commercial value at the time of conveyance.

Significantly, Interior Department decisions from early last century reflect this principle: Common clay, limestone, and other common inorganic materials were *not* regarded as "mineral" because there were "vast deposits of each of these materials underlying great portions of the arable land of this country." *Holman v. Utah*, 41 Pub. Lands Dec. 314, 315 (1912) (mineral "in the public-land laws is properly confined to land containing materials such as metals, metalliferous ores, phosphates, nitrates, oils, *etc.*, of unusual or exceptional value as compared with the great mass of the earth's substance."); *see also Stanislaus Elec. Power Co.*, 41 Pub. Lands Dec. 655, 657 (1912); *King v. Bradford*, 31 Pub. Lands Dec. 108, 109-110 (1901). The exception followed the common understanding: Only if valuable were they deemed mineral.

Thus in *Layman v. Ellis*, Interior addressed whether common materials were "minerals" subject to "location" of mining claims under the mining laws (30 U.S.C. § 22) and stated that common materials would be subject to location if, but only if, the particular deposit was, in fact, commercially valuable by reason of its proximity to a market. 52 Pub. Lands Dec. 714, 721 (1929) (gravel is a "mineral" where it "can be extracted, removed and marketed at a profit").

As the foremost early 20th-century authority on mineral law observed: "The real test seems to be the character of the deposit as occurring independently of the mere soil, valuable in itself for commercial purposes...." 1 Curtis H. Lindley, *American Law Relating to Mines and Mineral Lands* § 93, at 156 (3d ed. 1914).

In *U.S. v. Coleman*, this Court sustained Interior's determination that mining claims for quartzite, "one of the most common of all solid materials," were invalid under the 1872 Mining Law (30 U.S.C. § 22) where there was a "lack of an economically feasible market for the stone" and "immense quantities of identical stone found in the area outside of the claims...." 390 U.S. 599, 600, 603-04 (1968). Upholding the commercial marketability test, which imposed "a different and more onerous standard on claims for minerals of widespread occurrence than for rarer minerals," the Court stated:

> While it is true that the marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is great demand, sell at a price so high as to leave little room for doubt that they can be extracted and marketed at a profit.

Id. at 603.

Notably, Interior itself contemporaneously affirmed this principal – that the characterization of sand or gravel as minerals within a reservation depends on whether they had value at the time of conveyance. Specifically, in a 1956 formal Interior Solicitor's opinion interpreting a broadly worded federal statutory reservation of "timber, coal or *other*

minerals including oil and gas *and other natural deposits*," the Interior Solicitor recognized that Interior could regard sand and gravel as minerals for purposes of a mineral reservation *only* where those materials "can be shown *as of the date of ... patent* to have a *definite economic value* by reason of the existence and nearness of a market in which they can be sold at a profit...." App. 95a, 99a (emphasis added) (Op. Solic. Interior Dep't, M-36379 (1956)). This opinion, never rescinded or superseded by Interior or any court decision, was articulated shortly after the 1954 amendment to the STA and shortly before the 1959 STA patent deeds at issue in this case. It is therefore the most contemporaneous expression from Interior on how such reservations are to be construed.

The Interior Solicitor's 1956 legal opinion remains authoritative.[2] Most recently, it was cited in 2003 by the Tenth Circuit in support of the general principle that commercial value at the time of conveyance is determinative of whether sand and gravel comes within the scope of the related federal mineral reservation. *See Hess*, 348 F.3d at 1248-50 (lack of value demonstrates that the parties did not intend to treat those materials as "mineral"). In fact, the opinion was cited approvingly by this Court in *Western Nuclear*, too, albeit for a different proposition (*i.e.*, that sand and gravel may *sometimes* be deemed "mineral"). 462 U.S. at 56.

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[2] The opinion has never been rescinded or superseded by Interior, as is customary where an opinion no longer reflects the Department's view. *See, e.g.*, Op. Solic. Interior Dep't, M-37010 (2003), *referenced at* 68 Fed. Reg. 61046, 61054 (2003) (reconsidering and disapproving prior 1997 opinion).

Unless value is determined at the time of conveyance, ownership of the basic substance that comprises a particular property might shift over time. Such an approach would violate a fundamental property law principle: an interest in property should be determinate and determinable. *See Leo Sheep Co. v. U.S.*, 440 U.S. 668, 687 (1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned ...."). There is no precedent in property law for constantly mutating ownership interests; certainly nothing in these reservations made provisions for shifting ownership. Purchasers from the Government are entitled, just as are other purchasers, to know what is theirs at the time of conveyance. Hence the rule that common materials fall within the scope of a mineral reservation where a market exists for such materials is determined at the time of conveyance. Significantly, that was the rule applied by Interior at all relevant times.

* * *

The issue about the time as of which a common material's commercial value is to be determined was never posed by the parties in *Western Nuclear* nor passed upon in the Court's decision, so it remains an open question for this Court to address.[3] The issue was presented to the Court in *BedRoc* but the Court did not reach the issue because it found sand and gravel *categorically* beyond *any* Pittman Act mineral reservation.[4] The Fourth Circuit panel could have

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[3] The Solicitor General acknowledged in his brief filed in *BedRoc* that the *Western Nuclear* Court did not address this issue. 2003 WL 23099240, at *34 (Dec. 19, 2003).

[4] Still, the Court's reasoning is instructive. The Pittman Act's reservation was for "*valuable* minerals." The decisive point for determining what Congress meant by "valuable"

(continued....)

resolved the case on these grounds. This Court's adoption of this proposed rule would here resolve the issue of the treatment of land and gravel uniformly, under all of the remaining land-grant statutes. *Western Nuclear* did not address the value-at-time-of-conveyance issue and neither did *BedRoc*. It was Petitioners' lead argument below, and it was error for the Fourth Circuit to ignore it.

III. THE PHRASE "ALL . . . MINERALS" DOES NOT SIGNIFY AN INTENTION TO RESERVE COMMON MATERIALS.

As described above, this Court's endorsement of the rule that only sand and gravel with value at conveyance fall within a mineral reservation would settle the law.

This case also allows this Court to settle the law in different way: *Western Nuclear* should be recognized as the exception, not the rule. As *Western Nuclear* itself makes clear, the phrase "all...minerals" does not answer the question whether gravel is encompassed within a mineral reservation. Rather, the holding of *Western Nuclear* is tied to the unique grants of land under the SRHA. The Court can thus affirm that the general rule is that a mineral reservation normally does not include sand and gravel.

A. "All . . . Minerals" Usually Does Not Encompass Sand And Gravel.

In this case, the Government noted the similarity of language between the reservations at issue under the STA and the SRHA and argued that SRHA-like language,

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(continued) . . .

was *the time of the act's passage*. *BedRoc*, 541 U.S. at 185 n.6. Value attained later is beside the point.

appearing in other land-grant statutes, should be interpreted broadly, just as this Court interpreted "mineral" broadly in *Western Nuclear*. That approach to plain language was decisive for the IBLA panel, the district court, and ultimately the Fourth Circuit. But *Western Nuclear* was not a "plain language" case. It was, rather, a case in which the result flowed from unique characteristics of the SRHA and the land grants under it. This Court should so affirm.

First, as a general matter, it is simply not the case that the same words will always be given the same meaning, even when used in different statutes. To the contrary, meaning varies with context and the same word may have different meanings in different statutory contexts. Indeed, just recently, this Court reaffirmed that the same word, as used in two different places within the same statute, may be given different meanings. *See Envt'l Def. v. Duke Energy Corp.*, 127 S. Ct. 1423, 1432-33 (2007). And this has long been the rule. *See U.S. v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 214 (2001); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 522-24 (1994). This principle applies with particular force where the contextual elasticity of the words at issue (here, "minerals") is readily acknowledged and the statutory context must be examined in interpreting those words. *See Western Nuclear*, 462 U.S. at 42-43.

Second, *Western Nuclear* itself employed a "purpose" analysis to inform the "plain meaning" of the SRHA. The Court said: the "determination of whether a particular substance is included in the surface estate or the mineral estate *should be made in light of the use of the surface estate that Congress contemplated.*" *Id.* at 52 (emphasis added). It was in light of the unique qualities of the SRHA that the Court made the determination that conveyances under the SRHA reserved gravel to the United States. *Western*

Nuclear did not state a general rule or general definition of "mineral."

Third, the general rule is that common materials are not mineral. This conclusion has guided the lower courts' approach to the issue. The lower courts, even after *Western Nuclear*, generally declined to extend *Western Nuclear's* SRHA ruling to different land-grant statutes. Instead, *Western Nuclear* was largely confined to its particulars. *E.g.*, *Downstate Stone Co. v. U.S.*, 712 F.2d 1215 (7th Cir. 1983) ("Classification as a generic mineral resource, however, does not make limestone a mineral in legal contemplation...."); *Poverty Flats Land & Cattle Co. v. U.S.*, 788 F.2d 676, 683 (10th Cir. 1986) ("New BLM views as to mineral reservations arrived at long after a patent issued, cannot change the title the patentee received under the then prevailing practice and decisions."); *see also Hess*, 348 F.3d 1237. The Ninth Circuit's decision in *BedRoc* was the exception – which this Court corrected.

In 1992, the U.S. Claims Court, canvassing decisions rendered before and after *Western Nuclear,* found that "mineral" in a mineral reservation generally did not include gravel: "*Normally, gravel is not treated as a mineral within the meaning of a general reservation of minerals clause.*" *Burkey v. U.S.*, 25 Cl. Ct. 566, 578 (Cl. Ct. 1992) (emphasis added (citing *Bumpus v. U.S.*, 325 F.2d 264 (10th Cir. 1963)); *Cumberland Mineral Co. v. U.S.*, 513 F.2d 1399 (Ct. Cl. 1975)).

Significantly, the United States itself has argued for the limited reach of *Western Nuclear*. Where it is the United States' land that is subject to a mineral reservation, the Government has repeatedly argued – for the very reasons raised by Petitioners in this case – that the private party's mineral reservation does not extend to common materials.

For example, in a 1976 case, the U.S. Claims Court sided with the United States in finding that a private party's reservation of "the mineral, oil, and gas, in, upon and under" the land conveyed to the United States did not include common sandstone. *See Cumberland Mineral Co.*, 513 F.2d at 1402. *Accord Bumpus*, 325 F.2d at 267 (agreeing with the United States that gravel, abundant in quantity and exposed at the surface of the land, was not included in a reservation of "all ... minerals."). The Government's theory did not change after *Western Nuclear*. In *Burkey*, the United States argued that a reservation of "*all gas, oil and minerals*" in a conveyance to the United States did not include sand and gravel. After an exhaustive canvass of legal authorities, the Claims Court agreed in 1992. 25 U.S. Cl. Ct. at 578.

That common materials are not deemed mineral under mineral reservations is reflected in the common law cases, a point of particular importance. In "interpreting statutory mineral reservations ... [the Court has] emphasized that Congress ... intended the terms of the reservation to be understood in 'their ordinary and popular sense.'" *Amoco Prod. Co. v. S. Ute Indian Tribe*, 526 U.S. 865 (1999) (quoting *Burke v. S. Pac. R.R. Co.*, 234 U.S. 669, 679 (1914)). Thus, the "proper inquiry focuses on the ordinary meaning of the reservation at the time Congress enacted it." *BedRoc*, 541 U.S. at 184. Common law is a proper guide. *See Meyer v. Holley*, 537 U.S. 280, 285 (2003); *U.S. v. Bestfoods*, 524 U.S. 51, 63 (1998); *U.S. v. Texas*, 507 U.S. 529 (1993). *Accord Amoco*, 526 U.S. at 879 (citing common law to interpret federal mineral reservation).

As the Wyoming Supreme Court explained in 1988, "*the vast majority of courts have held for various reasons that gravel is not a mineral estate in general private grants or reservations of minerals.*" *Miller Land & Mineral Co. v.*

State Highway Comm'n, 757 P.2d 1001, 1003 (Wyo. 1988) (emphasis added) (citing *Heinatz v. Allen*, 217 S.W.2d 994, 997 (Tex. 1949)); *Elkhorn City Land Co. v. Elkhorn City*, 459 S.W.2d 762 (Ky. 1970); *Little v. Carter*, 408 S.W.2d 207 (Ky. 1966); *Lillington Stone Co. v. Maxwell*, 165 S.E. 351 (N.C. 1932); *Rysavy v. Novotny*, 401 N.W.2d 540, 542-43 (S.D. 1987) ("[T]he widely accepted and most prudent rule dictates that any such [common rock-like] material is not a reserved 'mineral,' absent specific language to the contrary, or other showing that the parties intended otherwise. . . . The rationale usually given is that a reservation of such material would in reality effectuate a grant of very little or nothing to the surface owner, and that the parties would not intend to negate the substance of their transaction.") In sum, *Western Nuclear*'s interpretation of the SRHA reservation was supported by the purpose of the unique reservation in that case, not its language.

B. The STA Was Not Enacted for the Same Purposes as the SRHA and *Western Nuclear* Should Not be Extended.

"Beginning with the Homestead Act of 1862, ch. 75, 12 Stat. 392, and stretching into the early 20th Century, Congress enacted a series of land-grant statutes aimed at settling the American frontier." *BedRoc*, 541 U.S. at 178. But Congress was concerned about preserving mineral wealth. The answer was a series of laws aimed at serving mineral and surface uses by conveying federal land subject to a mineral reservation for the Government. *Amoco*, 526 U.S. at 870; *Western Nuclear*, 462 U.S. at 49.

Different statutes served different purposes. Sometimes Congress' focus was on specific surface uses, such as grazing on large tracts of western lands (as with the SRHA, at issue in *Western Nuclear*). The 1919 Pittman Act (at issue

in *BedRoc*) encouraged agricultural development of land, albeit only in one specific state, Nevada. In the Recreation and Public Purposes Act of 1926, amended in 1954, Congress focused on disposal of lands for "recreational" or "public" purposes. *See* 43 U.S.C. § 869, *et seq.* Sometimes Congress reserved a single mineralogical material and did not express any views on surface uses (*e.g.*, Coal Lands Acts of 1909 and 1910, at issue in *Amoco Production*).

In stating that the reservation analysis "should be made in light of the use of the surface estate that Congress contemplated," *Western Nuclear*, 462 U.S. at 52, the *Western Nuclear* Court cited unique features of the SRHA. The SRHA granted tracts of up to 640 acres – one square mile – to private citizens in exchange for a commitment to use the land for agriculture or stock-raising. *See id.* at 53. The Court reasoned that Congress would not have expected ranchers to develop mineral resources under the land, and would have wanted to broadly maintain incentives to encourage others to enter and develop all such resources. *Id.*

Importantly, there was nothing incompatible about the use of such enormous tracts for ranching and the possibility of concurrently extracting sand and gravel from part of the property. The intended agricultural use of the surface estate was compatible with a broad reservation of common rock and stone on these enormous tracts, available to whomever might choose to enter and "locate" those materials for extraction. Congress wanted natural resources to be appropriately developed. As this case illustrates, an owner of a small plot has a market incentive to exploit sand and gravel if it turns out to be the best use of the private land.

The terms of the exchange favored a broad construction of the reservation as well. *Western Nuclear* characterized the SRHA as a statute under which the grantee did and paid

little and in turn received a bare surface estate on a great deal of land. The land was given away practically for free, to be used for agriculture, and the surface owner's interest centered on that specified use. Thus, the basic bargain rationally supported a broad mineral reservation held by the granter. A broad reading of the reservation was further supported by the compensation the SRHA provided surface owners for destruction caused by mineral excavation. *See id.* at 51 n.11. The compensation provision helped satisfy this Court that Congress intended simultaneously to promote agriculture and aggressive exploitation of "mineral" resources on SRHA tracts. *Id.* at 47.

These unique considerations are not present in the STA. The STA was enacted to dispose of small parcels of surplus federal land for uses involving surface structures. Land was not *given* away; it was *sold* at appraised value. Plots were small and non-agricultural. Purchasers could buy up to five acres "*not suitable for agricultural use or for grazing*," for "a home, cabin, camp, health, convalescent, recreational, and *business site*," App. 49a, 84a (emphasis added), or (pursuant to the 1954 amendment) municipal and public uses. App. 56a, 86a. Extraction of common materials from such small parcels by Government lessees who are not the land owner is *not* concurrently compatible with the ordinary residential, business and civic developments contemplated by the STA on these small plots. Moreover, unlike the SRHA, Congress did *not* provide for compensation to the surface owner for damages from the exploitation of minerals by others at the site.

Congress would surely have understood that the degree of surface destruction caused by sand and gravel quarrying would be quite significant where the surface estate is no larger than five acres. This was not a factor under the

SRHA, where the tracts were up to 640 acres and patentees were, in any event, compensated for surface damage caused by mineral extraction. *Cf. Western Nuclear*, 462 U.S. at 51 n.11. On the other hand, as the Tenth Circuit observed in its 2003 *Hess* decision: "if a majority of the ... property is underlain with gravel and such gravel cannot be mined without disturbing the property's surface, *the general rule applies that a mineral reservation of all minerals does not include gravel.*" 348 F.3d at 1246 (emphasis added). *Accord Downstate Stone*, 712 F.2d at 1218.

One needs no special incentive to discover sand and gravel in Arizona (and the other semi-arid western states where the STA applied). Sand, gravel, rock and stone were apparent. Thus, with respect to sand and gravel, Congress could not have been concerned that it was *unwittingly* conveying wealth of which it was unaware – which, after all, is the *purpose* of a mineral reservation. Where such materials are apparent, one would expect a party intending to reserve such materials to say so. The fact that the grantor did not say so suggests that sand and gravel – worthless at the time – were not within the contemplation of the reservation. *See Bumpus*, 325 F.2d at 265, 267 ("more reasonable to conclude that a reservation to the owners of the subsurface estate would be limited to minerals lying below the surface and not those exposed at the surface and lying near the surface of the land").

Conversely, given the small, five-acre size of the STA plots, it is difficult to conceive that the prospective purchaser, observing a property covered with rocks, stone, sand and gravel, would have paid appraised value believing that the sand and gravel that comprised the land was not his at all. Congress' desire to have private individuals purchase and inhabit STA parcels would surely have been frustrated if

prospective purchasers knew that they were not receiving title to the materials that made up the bulk of the land they were buying. *See BedRoc*, 541 U.S. at 182 n.4 (quoting *Western Nuclear*, 461 U.S. at 71-72 (Powell, J., dissenting)). It is difficult, therefore, to imagine that Congress believed that it could have successfully marketed these surplus properties based on the Government's current theory.

To be sure, the Fourth Circuit tried to find support for its view in various legal authorities App. 9a-10a. But the analysis was misguided. Contemporaneous legislation demonstrates that Congress simply did not think of sand and gravel as "mineral." In the war-time act of September 27, 1944, Congress authorized Interior to dispose of "sand, stone, gravel, vegetation, and timber or other forest products ... if the disposal of such *materials* is not otherwise expressly authorized by law...." 58 Stat. 745 (emphasis added). Three years later, the Materials Act of 1947, 61 Stat. 681, authorized disposal of "*materials*, including but not limited to sand, stone, gravel, yucca, manzanita, mesquite, cactus, common clay, and timber or other forest products, on public lands ..." (emphasis added). At the time of these statutes, the mining laws (30 U.S.C. § 22) *already provided* a means of disposing of "minerals." Rather than call common materials "minerals," Congress called them "*materials*."[5]

In 1955, Congress re-labeled this category "mineral materials" – again declining to call sand, gravel and other common materials "minerals." Pub. L. 84-167, Ch. 375, § 1,

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[5] The Fourth Circuit said that the Materials Act of 1947 authorized Interior "to dispose of minerals, specifically including sand and gravel." App. 9. The court simply overlooked the distinction between "materials" (or "mineral materials") on one hand, and "minerals," on the other.

69 Stat. 367; 30 U.S.C. § 601. And with the 1955 Common Varieties Act, Congress "restored" Interior's historical rule that sand and gravel are not minerals. *See BedRoc*, 541 U.S. at 186 & n.7. That law said: "No deposit of common varieties of sand [and] gravel ... shall be deemed a valuable mineral deposit within the meaning of the mining laws.***" Pub. L. 84-167, Ch. 375, § 3, 69 Stat. 368; 30 U.S.C. § 611. Moreover, as noted above, the contemporaneous decisions of the Interior Department reflected the rule that such materials would be regarded as minerals only where they possessed commercial value.

* * *

In sum, the Interior Department argues that, in construing "all ... minerals" in *Western Nuclear*, this Court announced a general rule and those words should be given the same meaning in whatever granting statutes they are used. That argument carried the day below, but it unsettles ownership of the very grit of the properties of tens of thousands of land owners who own their fee simple subject to a federal mineral reservation. For the benefit of those landowners, this Court can and should make clear that *Western Nuclear* is the exception, not the rule (or, conversely, to the great benefit of the Interior Department, confirm that it is, in fact, the rule).

IV. THIS IS NOT A PROPER CASE FOR DEFERENCE TO THE AGENCY.

The Solicitor General may oppose this Petition by asserting an alternative ground for affirmance. The district court resolved this case by granting *Chevron* deference to the IBLA decision finding that an STA mineral reservation should be given the same interpretation as the SRHA mineral reservation addressed in *Western Nuclear*. Petitioners

explained that no deference was due the IBLA on its resolution of this legal issue. The Fourth Circuit did not address the deference question.

If the Government does assert this alternative theory, it should not dissuade the Court from granting review. First, the deference question is itself important. Second, its resolution *in favor of the United States* would also put to rest much uncertainty about the scope of federal mineral reservations. The issue would be removed from the courts, delegated to the agency, and IBLA rulings would prevail.

On the merits of the question, however, this Court is far more likely to recognize that there is no legal basis for deference to the IBLA on this issue. This Court's leading decisions addressing the scope of federal mineral reservations, *BedRoc* and *Western Nuclear*, do not suggest that a federal court is to defer to the interpretive views of the IBLA on such statutory issues. Indeed, no federal court has afforded deference to an IBLA ruling on this type of legal question. Legal questions, by the terms of the APA, are reserved to the courts. *See* 5 U.S.C. § 706 (court to "decide all relevant questions of law").

Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), reflects the premise that in crafting statutes, Congress may leave *policy*-based gaps for the administering agency to address.[6] Here, the IBLA did not exercise a *policy* judgment. Rather, in resolving the legal question, the IBLA engaged in standard-fare *legal* analysis, examining legal sources, notably this Court's precedents.

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[6] Insofar as *policy-making* within Interior is concerned, Interior has never promulgated a rule on what materials are within the scope of the STA's mineral reservation.

See App. 59a-61a (IBLA citing *Western Nuclear* and *BedRoc*). It would be odd for this Court (or any federal court) to defer to an agency decision interpreting the Court's precedents.

The APA does not require deference to agency views on legal questions. Law is not within the special expertise of federal agencies. Law is a judicial specialty. The APA vests courts with responsibility to decide "all relevant questions of law." 5 U.S.C. § 706. *Cf. United States v. Mead Corp.*, 533 U.S. 218, 227-35 (2001) (deference due where challenged decision is the result of deliberative process which results in a *policy-based* rule).

This is not to suggest that policy choices are never made in adjudication. *E.g.*, *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). But the IBLA acts simply as an adjudicative tribunal within Interior. It does not make rules or regulations, other than for its own procedures. *See* 43 C.F.R. § 4.400, *et seq.* The IBLA was established to decide cases, not set agency policy. *Cf. Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003) (Mine Safety and Health Review Commission decides enforcement disputes; Secretary of Labor sets federal mine safety policy). Even if the IBLA possesses policy-making power, the IBLA did not purport to make a policy choice. It tried to judge the issues here in the same way that a lower court would approach the issues. Its legal judgment is subject to *de novo* review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2007

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOURTH CIRCUIT

No. 05-2362

NEW WEST MATERIALS LLC; JWR, INCORPORATED,

Plaintiff-Appellants,

and

CALMAT COMPANY D/B/A VULCAN MATERIALS COMPANY,

Plaintiff,

v.

INTERIOR BOARD OF LAND APPEALS; BUREAU OF LAND MANAGEMENT,

Defendants-Appellees.

NATIONAL STONE, SAND & GRAVEL ASSOCIATION,

Amicus Supporting Appellants.

Argued and Submitted Nov. 29, 2006

Filed Feb. 8, 2007

Before WILKINSON and DUNCAN, *Circuit Judges* and GOODWIN, *United States District Judge for the Southern District of West Virginia*, sitting by designation.

Affirmed by unpublished per curiam opinion.

PER CURIAM:

The central issue in this appeal is the meaning and scope of a mineral reservation in a patent granted under the Small Tract Act ("STA"). 43 U.S.C. § 682a (1970).[1] Specifically, the question before us is whether sand and gravel are included in the reservation of "the oil, gas and all other mineral deposits" contained in a land patent issued pursuant to the STA. The Bureau of Land Management ("BLM") concluded that sand and gravel fall within this mineral reservation and issued appellants, New West Materials ("New West"), a notice of trespass. Appellants appealed the BLM's notice of the Interior Board of Land Appeals ("IBLA"), which affirmed the BLM's trespass determination. New West and JWR Inc. then initiated this suit in federal court, seeking review of the IBLA's final administrative decision. After considering cross-motions for summary judgment, the district court affirmed the IBLA. *New West Materials, LLC v. IBLA*, 398 F. Supp. 2d 438 (E.D. Va. 2005). For the following reasons, we affirm.

I.

The district court opinion provides a detailed recitation of the facts and background in this case. A short summary of the facts will, therefore, suffice here. The Small Tract Act of 1938 authorized the Secretary of the Interior to sell or to lease small, isolated five acre tracts of public lands to be used for "home, cabin, camp, health, convalescent, recreational, or business site" purposes. 52 Stat. 609 (1938).

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[1] Small Tract Act of 1938, Ch. 317, 52 Stat. 609, *amended by* Ch. 270, 68 Stat. 239 (1954), *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 702, 90 Stat. 2789.

In addition, the STA required the patents under which land was sold to contain a reservation to the United States of the "oil, gas, and other mineral deposits, together with the right to prospect for, mine, and remove the same under such regulations as the Secretary may prescribe." *Id.*

This case involves an eighty-two acre tract of land located approximately twenty miles outside of downtown Phoenix, Arizona. In 1959, the BLM, an agency of the United States Department of the Interior ("DOI"), conveyed the land via patent deeds pursuant to the STA to several private owners in separate parcels approximately five acres in size.

Shortly after acquiring the subject-land in August of 2000, appellant JWR, Inc. ("JWR") leased the land to co-appellant New West for the express purpose of New West's extraction of sand and gravel from the land. In 2001, the BLM discovered that New West was actively mining sand and gravel on the land.

On November 1, 2001, the BLM claimed ownership of the sand and gravel found on the land. The BLM asserted that New West was not authorized to remove the sand and gravel without the approval of the DOI. On January 3, 2002, the BLM served New West with a notice of trespass stating that New West had "committed an act of nonwillful trespass by removing and selling mineral material without a valid contract" in violation of 43 C.F.R. § 9239.0-7.

New West and JWR appealed the notice of trespass to the IBLA pursuant to 43 C.F.R. § 4.411. On December 2, 2004, the IBLA upheld the BLM's trespass determination in a written decision in *New West Materials*, 164 IBLA 126 (2004). After the IBLA denied New West's motion for reconsideration, appellants sought judicial review of the Board's decision pursuant to the Administrative Procedure

Act, 5 U.S.C. § 701, in the District Court for the Eastern District of Virginia.

In the district court, appellants sought 1) a declaration that the United States, acting through the BLM, had no ownership interest in the sand and gravel of the subject lands, and 2) an injunction enjoining the BLM from asserting a claim of trespass and resulting damages against New West and JWR. Because the material facts in the case were essentially undisputed, the parties filed cross-motions for summary judgment. The district court granted the government's motion for summary judgment and denied New West's motion. *See New West Materials, LLC v. Interior Bd. of Land Appeals*, 398 F. Supp. 2d 438 (E.D. Va. 2005).

The district court determined that because Congress had conferred upon the DOI the authority to implement the STA, the IBLA's interpretation of the STA was entitled to deference and must be upheld if it was reasonable. Ultimately, the court found that the IBLA's interpretation was "based on a permissible construction of the statute." *Id.* at 453 (citing *Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). The court concluded that sand and gravel are minerals pursuant to the STA reservation. This appeal followed.

II.

We review the district court's grant of summary judgment *de novo*. *Francis v. Booz, Allen & Hamilton*, 452 F.3d 299, 302 (4th Cir. 2006). Although we view the evidence in the light most favorable to the nonmoving party, we review any conclusions of law *de novo*. *Blaustein & Reich, Inc. v. Buckles*, 365 F.3d 281, 286 (4th Cir. 2004). In particular, we review questions of statutory interpretation *de*

novo. *United States b. Abuagla*, 336 F.3d 277, 278 (4th Cir. 2003).

New West contends that the district court erred in affording deference to the IBLA's decision. Because we base our decision on our own interpretation of the statute, there is "no occasion to defer and no point in asking what kind of deference, or how much" we should grant in this case. *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 114 (2002). Therefore, we do not reach the question of whether the IBLA's decision is owed deference.

III.

In interpreting a federal statute, we begin by examining its plain language. *Reid v. Angelone*, 369 F.3d 363, 367 (4th Cir. 2004). We must give the relevant terms their "common and ordinary meaning." *Id.* If the language is unambiguous, that is the beginning and end of our inquiry. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (citing *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004)). Here, we agree with the district court that the word mineral is ambiguous, as it is "used in so many senses, dependent upon the context." *New West*, 398 F. Supp. 2d at 445 (quoting *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 42 (1983)). The term is so broad that it could encompass virtually all of any conveyance of land. *Western Nuclear*, 462 U.S. at 43.

The Supreme Court has twice considered whether materials such as sand and gravel are reserved minerals under other federal statutes administered by the DOI. *See BedRoc*, 541 U.S. at 184-86; *Western Nuclear*, 462 U.S. at 43. In *Western Nuclear*, the Court interpreted a reservation of "all the coal and other minerals" contained in the Stock-Raising Homestead Act of 1916 ("SRHA"). *Western Nuclear*, 462 U.S. at 60. The Court held that gravel was a reserved mineral pursuant to the SRHA. *Id.*

In *BedRoc*, the Court distinguished *Western Nuclear* without overruling it. The statute at issue in *BedRoc*, the Pittman Underground Act of 1919 ("Pittman Act"), reserved "all the coal and other valuable minerals" to the United States. *BedRoc*, 541 U.S. at 185. The Court refused to extend the rationale of *Western Nuclear* to the Pittman Act because the Court found that the Act's plain meaning would not support it. *Id.* at 186. The Court relied on Congress's addition of the modifier "valuable," which was absent in the SRHA, in holding that sand and gravel were not "valuable minerals" reserved by the Pittman Act. *Id.*

In these cases, the Supreme Court considered 1) the plain meaning of the reservation at issue, 2) the contemporary legal sources' understanding of the meaning of the word mineral, and 3) the purpose of the mineral reservation in question. Using the analysis applied by the Supreme Court in both *BedRoc* and *Western Nuclear* and the analysis that the district court correctly applied in this case, we find that the term mineral, as used in the STA, encompasses sand and gravel.

A.

We look first to the plain language of the STA. The plain language of the STA is instructive as to the intended reach of its mineral reservation. In the 1954 STA amendments, Congress clarified the scope of the Act's mineral reservation by including the modifier "all." As amended, the relevant portion of section 2 of the STA reserved to the United States "the oil, gas, and *all* other mineral deposits." 43 U.S.C. § 682a, 68 Stat. 239 (1954) (emphasis added). In rewriting the language of the STA, Congress reduced any ambiguity on the question of what mineral deposits might be included under the reservation. We follow the "canon of statutory interpretation [which]

requires us to presume that the legislature says in a statute what it means and means what it says." *BedRoc*, 541 U.S. at 183 (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). Applying this canon, we agree with the district court that the plain meaning of the amendment is clear: "Congress intended the STA's mineral reservation to be given the broadest interpretation possible." *New West*, 398 F. Supp. 2d at 446.

Previous Supreme Court opinions provide guidance in our interpretation of the term mineral. In *Western Nuclear*, the Court held that gravel was a reserved mineral pursuant to the SRHA, while in *BedRoc*, the Court held that sand and gravel were not "valuable minerals" reserved to the United States pursuant to the Pittman Act. *BedRoc*, 541 U.S. at 186; *Western Nuclear*, 462 U.S. at 60.

The *BedRoc* plurality distinguished the Pittman Act from the SRHA by emphasizing the addition of the modifier "valuable" in the Pittman Act's reservation. *Id.* at 184-86. The Pittman Act reserved "all the coal and other valuable minerals." *Id.* at 179. The Court reasoned that the Pittman Act's reservation of "valuable minerals" required a narrower interpretation than the reservation of "all the coal and other minerals" found in the SRHA. *BedRoc*, 541 U.S. at 183-84.

The mineral reservation in the amended STA of "oil, gas, and all other mineral deposits" and the reservation in section 9 of the SRHA of "all the coal and other minerals" are strikingly similar. The Supreme Court interpreted the SRHA's reservation to include gravel. *Western Nuclear*, 462 U.S. at 60. Accordingly, the district court in this case reasoned that because the modifier "valuable" was necessary to distinguish the Pittman Act's reservation from that of the SRHA, "the absence of the term valuable in the STA's mineral reservation compels the conclusion that the *Western*

Nuclear holding is persuasive, if not, controlling." *New West*, 398 F. Supp. 2d at 446. We agree. In employing the Court's same plain meaning of the STA's reservation commands the most expansive interpretation available under existing law.

B.

The excellent and thorough opinion of the district court also considered the contemporary legal sources' understanding of the term mineral at the time of the STA's passage. *New West*, 398 F. Supp. 2d at 447-48; *see also BedRoc*, 541 U.S. at 184 ("[T]he proper inquiry focuses on the ordinary meaning of the reservation at the time Congress enacted it."). The district court noted that contemporaneous judicial decisions, opinions of the Secretary of the Interior, and IBLA decisions bolstered the idea that the STA's mineral reservation included sand and gravel. We agree with the district court's determination that those decisions further support the conclusion that minerals under the STA were intended to include sand and gravel. *See Dredge Corp. v. Penny*, Civ. No. 475 (D. Nev. 1964) (holding that minerals including sand and gravel found on STA lands were not subject to prospecting until the DOI issued appropriate rules and regulations), *affirmed by Dredge Corp. v. Penny*, 362 F.2d 889 (9th Cir. 1966); *Layman v. Ellis*, 52 L.D. 714, 718 (1929) (citing publications "wherein sand and gravel [had] uniformly been classed as a mineral resource").

The district court found further support for its conclusion in the Materials Act of 1947. *New West*, 398 F. Supp 2d at 448-49. The Materials Act gave the DOI the authority to dispose of minerals, specifically including sand and gravel, and Congress passed this act eight years after the STA was originally passed and seven years before the STA was amended to expand the mineral reservation to "all other

mineral deposits." *See* Materials Act of 1947, 30 U.S.C. § 601. Because the Materials Act passed contemporaneously with the STA and its amendments expressly granted the DOI authority to dispose of "mineral materials" such as sand and gravel, we believe that this Act adds further support to the holding that the mineral reservation in the STA includes sand and gravel.

C.

In considering the purpose of the STA's mineral reservation, we find the Supreme Court's analysis of the SRHA helpful. The Court found that the primary congressional purpose in reserving the mineral estate under the SRHA was to promote "concurrent development of both surface and subsurface resources." *Western Nuclear*, 462 U.S. at 50. The *Western Nuclear* Court concluded that "the determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated." *Id.* at 52. In the Court's view, inclusion of gravel in the surface estate in SRHA lands would lead to the illogical result of making subsurface development of gravel resources dependent on "the initiative of persons who interest were known to lie elsewhere." *Id.* at 56.

We find *Western Nuclear*'s reasoning applicable to STA lands. As the district court explained: "Just as Congress should not have expected the ranchers and farmers who received grants pursuant to the SRHA to exploit the subsurface estate, Congress likewise could not have expected the homeowners or small business owners of five acre plots to exploit the subsurface estate." *New West*, 398 F. Supp. 2d at 449. Congress specified the types of small surface estates permitted by the STA. These estates included residential homes, small businesses, recreational sites, and health

centers. 43 U.S.C. § 682a. We cannot infer from any of these intended uses the possibility that individual owners were permitted to exploit the minerals underlying their land. This is not to say that some incidental disruption to the sand and gravel of an estate in order to build a home, for example, would justify a trespass claim. It is wholly another matter, however, to sell or lease a group of small limited purpose parcels of land for full-scale commercial mining.

IV.

The Supreme Court's prior decisions guide our interpretation of the STA. After following the Court's analysis by considering the language of the statute, the contemporaneous legal sources, and the congressional purpose of the STA's mineral reservation, we hold that the STA's reservation of the "oil, gas and all other mineral deposits" encompasses sand and gravel deposits.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS

FOURTH CIRCUIT

No. 05-2362

NEW WEST MATERIALS LLC; JWR, INCORPORATED,

Plaintiff-Appellants,

and

CALMAT COMPANY D/B/A VULCAN MATERIALS COMPANY,

Plaintiff,

v.

INTERIOR BOARD OF LAND APPEALS; BUREAU OF LAND MANAGEMENT,

Defendants-Appellees.

NATIONAL STONE, SAND & GRAVEL ASSOCIATION,

Amicus Supporting Appellants.

Filed Apr. 13, 2007

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Duncan, and Judge Goodwin, U.S. District Judge, sitting by designation.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

No. 05cv403

NEW WEST MATERIALS LLC AND JWR, INCORPORATED,

Plaintiffs,

v.

INTERIOR BOARD OF LAND APPEALS AND
BUREAU OF LAND MANAGEMENT,

Defendants.

Filed Oct. 28, 2005

MEMORANDUM OPINION

ELLIS, *District Judge:*

At issue in this Administrative Procedure Act[1] ("APA") suit for review of final agency action is whether the reservation of "oil, gas, and all other mineral deposits" in the Small Tract Act of 1938[2] ("STA") encompasses sand and gravel.

I.[3]

Because this dispute involves the interpretation of the STA's mineral reservation, a brief recitation of the STA's history and pertinent provisions is in order at the outset.

The STA, originally passed in 1938, authorized the Secretary of the Interior to sell or lease five acre tracts of public lands,[4] "which the Secretary may classify as chiefly valuable as a home, cabin, camp, health, convalescent,

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[1] *See* 5 U.S.C. § 701 *et seq.*

[2] 52 Stat. 609 (1938), *amended by* 68 Stat. 239 (1954), *repealed by* 90 Stat. 2798 (1976).

[3] The facts recited here are largely undisputed. Where disputes exist, they are noted and, if material, the facts are construed favorably to plaintiff, as required. *See Matsushita Elec. Indus. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

[4] Under the original version of the STA, the Secretary could dispose of "any vacant, unreserved, surveyed public land, or surveyed public land withdrawn or reserved by the Secretary of the Interior for other purposes, or surveyed lands withdrawn by Executive Orders Numbered 6910 of November 26, 1934, and 6964 of February 5, 1935 . . . ."

recreational, or business site." STA 52 Stat. 609 (1938). The sales or leases were to be accomplished under "such rules and regulations as [the Secretary] may prescribe." *Id.* In addition, the STA required the patents under which land was sold to contain a reservation to the United States of the "oil, gas, and other mineral deposits, together with the right to prospect for, mine, and remove the same under such regulations as the Secretary may prescribe." *Id.*

When the STA was amended in 1954, the permissible purposes for which the Secretary could sell the land were expanded to include "residence, recreation, business, or community site purposes." 68 Stat. 239. The statute was amended in order to: (i) expand the category of uses for which the Secretary could sell or lease STA land to include community site purposes, such as municipal, religious or educational purposes, (ii) simplify the STA's administration, and (iii) allow the Secretary to dispose of unsurveyed lands through the STA. *New West*, 164 IBLA at 134 (citing H.Rep.No. 2212, 80th Cong. 2nd Sess., June 4, 1948, to accompany H.R. 5555, at 2). The STA's mineral reservation was unchanged except for the addition of the word "all" before the words "other mineral deposits." As amended in 1954, therefore, the STA's mineral reservation granted to the United States the "oil, gas and all other mineral deposits" on land sold or leased pursuant to the STA.

Approximately twenty years after the amendment, in 1976, the STA was repealed when Congress passed the Federal Land Policy and Management Act of 1976 ('FLPMA"). Importantly, however, the FLPMA expressly preserved the rights of the United States under the STA's mineral reservation provision. *See* 43 U.S.C. § 1701 (2005).

The current dispute involves an 82 acre tract of land ("subject land") conveyed by the United States in 1959 via

patent deeds to several private owners in separate parcels approximately five acres in size. Pursuant to the STA the patent deeds reserved the mineral rights to the United States.[5] At the time of the conveyance, the subject land was essentially desert and it remained in this state and vacant for roughly forty years when, in August 2000, plaintiff JWR, Inc. ("JWR") acquired the individual parcels comprising the subject land from private owners.

The subject land is located in Maricopa County, Arizona, approximately 20 miles from downtown Phoenix, and extends along the Agua Fria River channel. River channels constitute an important source for aggregate materials such as sand and gravel because the sand and gravel is typically cleaner and less cemented. Accordingly, and in light of the continued expansion of metropolitan Phoenix, JWR entered into a lease agreement with plaintiff New West Materials ("New West") in October 2000 for the express purpose of New West's extraction of sand and gravel from the subject lands.[6] The record reflects that New West's subsequent mining operation has extracted over 2.5 million tons of sand and gravel from two large mining pits, which are 20 to 28 feet deep, and cover an area of 268,000 square feet or roughly six and one half acres.

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[5] *See, e.g.*, Patent number 1196673 to Wilbur C. Bayham, June 23, 1959 (Administrative Record Vol. 1-5) ("Excepting and reserving, also, to the United States all oil, gas and other mineral deposits, in the land so patented together with the right to prospect for, mine, and remove the same according to the provisions of said Act of June 1, 1938.").

[6] New West's interest in the JWR lease was subsequently purchased by CalMat Co., dba Vulcan Materials Company, Western Division, in February 2005.

On November 1, 2001, defendant Bureau of Land Management ("BLM"), an agency of the U.S. Department of the Interior ("DOI"), asserted ownership on behalf of the United States of the sand and gravel found on the subject land by virtue of the mineral reservation clause of the STA and the patent deed. According to the BLM, New West was not authorized to remove the sand and gravel without the approval of the DOI and an associated BLM material sales contract. In addition to the mineral reservation clause of the STA, the BLM based its notice on the statutory authority of the DOI Secretary,[7] and DOI regulations which forbid the removal of materials from "public lands" except as permitted by the DOI.[8] The BLM's interpretation of the mineral reservation was informed by the Supreme Court's decision in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), which interpreted a similar reservation of "all coals and other minerals" in the Stock-Raising Homestead Act of 1916 ("SRHA"), 39 Stat. 862, *repealed by* 90 Stat. 2744 (1976), to include gravel.

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[7] 43 U.S.C. § 1201 "The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of Title 32 of the Revised Statutes not otherwise specially provided for.").

[8] *See e.g.* 43 C.F.R. § 9239.0-7 ("The extraction, severance, injury, or removal of timber or other vegetative resources or mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States, and will be subject to prosecution for such unlawful acts.").

On November 21, 2001, New West responded to the BLM's trespass notice, noting its disagreement with the BLM's interpretation of the STA and asserting its right to continue extracting sand and gravel from the subject lands. On January 3, 2002, the BLM issued a notice of trespass to New West and JWR for the unauthorized removal of the sand and gravel. This notice of trespass stated that the alleged trespass was non-willful. On February 1, 2002 New West and JWR appealed the BLM's trespass determination to the defendant Interior Board of Land Appeals ("IBLA") pursuant to the regulations set forth in 43 C.F.R. § 4.411.[9] Throughout 2002, the parties filed briefs contesting the legal issue before the IBLA.[10]

While the appeal to the IBLA was pending, the Supreme Court issued its opinion in *BedRoc Ltd. LLC v. United States*, 541 U.S. 176 (2004), interpreting a reservation of "all the coal and other valuable minerals in the lands so entered and patented" contained in the Pittman Underground Water Act of 1919[11] ("Pittman Act") as not encompassing sand and gravel. Central to the Supreme Court's decision was the fact

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[9] New West and JWR also filed a concurrent Petition to Stay the BLM's decision pursuant to 43 C.F.R. § 4.21(b). On April 24, 2002, the stay was granted on the condition that New West file a verified accounting and post a bond. The terms of the stay and New West's compliance became a disputed issue during the pendency of the appeal.

[10] On March 27, 2002, the BLM responded to New West's statement of reasons, to which New West replied on April 19, 2002. On July 3, 2002 the BLM filed a response with several arguments in support of its interpretation that the STA's reservation included sand and gravel.

[11] 41 Stat. 293, *repealed by* 78 Stat. 389 (1964).

that the reservation applied only to "valuable" minerals, which, according to the Court, did not include sand and gravel at the time the Pittman Act was passed. *Bedroc*, 541 U.S. at 184. Thereafter, on May 4, 2004, the IBLA requested supplemental briefing from the parties discussing the Supreme Court's decision pursuant to its authority under 43 C.F.R. 4.1. The parties submitted their initial briefs in June 2003 and their responses in July 2003.

On December 2, 2004, the IBLA upheld the BLM's trespass determination in a written decision in *New West Materials*, 164 IBLA 126 (2004). In doing so, a majority of the three administrative judge panel relied on five primary arguments: (i) inferences drawn from the DOI's contemporaneous regulations governing the disposition of the minerals contained in the STA, *Id.* at 130-32, (ii) the amendment of the mineral reservation in 1954 to include the modifier "all," *Id.* at 133-34, (iii) the similarities between the STA's reservation and the mineral reservation of the Stock-Raising Homestead Act of 1916, construed by the Supreme Court in *Watt v. Western Nuclear*, 462 U.S. 36 (1983), as encompassing gravel, *Id.* at 136, and (v) the "established rule that land grants are construed favorably to the Government." *Id.* (quoting *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116 (1957)). The third administrative judge dissented, chiefly on the ground that a reservation of sand and gravel on the five acre tracts envisioned by the STA would destroy the surface estate, and deprive the surface estate owner of the substance of his bargain without compensation. *Id.* at 143-45. The dissent also argued that the presumption in favor of the United States does not apply where, as in the case of the STA, the land is transferred by sale or lease and not by grant. *Id.* at 147.

On January 28, 2005 New West filed a motion for reconsideration pursuant to 43 C.F.R. § 4.403, arguing that

because this was an issue of first impression, and given the decision's significant impact on public land law more generally, "extraordinary circumstances" existed warranting reconsideration.[12] The IBLA denied New West's petition for reconsideration in March 2005, explaining that New West had misread both the STA and the IBLA's decision, and that New West had not shown the "extraordinary circumstances" necessary to warrant reconsideration. The dissenting administrative judge noted that the Petition for Reconsideration had raised new arguments that ought to be addressed, and reaffirmed his position that the panel had decided the issue incorrectly in the first instance. Both the initial decision of IBLA upholding the BLM's trespass determination, as well as the denial of New West's petition for reconsideration constitute final agency action pursuant to 5 U.S.C. § 704.

Having exhausted its avenues for relief with the agency, New West filed the present suit on April 11, 2005, seeking judicial review of the IBLA's decision and a declaration that the IBLA's decision is arbitrary and contrary to law pursuant to the Court's authority under 5 U.S.C. § 706(a)(2). Additionally, New West seeks a further declaration that the United States, acting through the BLM, has no ownership interested in the sand and gravel of the subject lands, and an injunction enjoining the BLM from asserting a claim of trespass and resulting damages against New West and JWR.

Th parties, recognizing that the material facts in this case are essentially undisputed, have filed cross-motions for

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[12] 43 C.F.R. § 4.403 provides in pertinent part, that" "The Board may reconsider a decision in extraordinary circumstances for sufficient reason."

summary judgment pursuant to Rule 56(c), Fed. R. Civ. P. the motions have been fully brief and argued, and are now ripe for disposition.

II.

Principles governing summary judgment are well-established. A party's motion for summary judgment should be granted if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed. R. Civ. P. In determining whether to grant a party's motion, a court must assess the evidence offered by both parties and "determine whether there is a genuine issue for trial" after resolving all factual disputes in the non-moving party's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). To defeat a summary judgment motion, the non-moving party may not rest upon mere allegations or denials, but must "set forth specific facts showing that there is a genuine issue for trial." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Summary judgment is especially appropriate in actions brought under the APA for judicial review, where "the focal point . . .should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S 138, 142 (1973).

III.

A. Scope of Review & Deference

This is a suit to review a final agency action under 5 U.S.C. § 706, and therefore the IBLA's decision must be upheld unless it is determined that the decision is "arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law."[13] As the facts of this case are essentially undisputed, the question presented is whether the agency's interpretation that the STA's reservation of the "oil, gas, and all other mineral deposits" includes common sand and gravel passes muster under § 706, namely whether it is arbitrary, capricious, or contrary to law. This is a question of law and judicial review is *de novo*, as the judiciary is the final arbiter of the law's meaning. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Yet, because the agency decision under review is the agency's interpretation of a statute Congress arguably intended and anticipated would be elucidated by the agency, a threshold question to be addressed is whether the agency's decision is entitled to any degree of deference and, if so, the nature and degree of the appropriate deference.

The doctrine of deferential judicial review of an agency's interpretation of its own statute is well-established.

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[13] Section 706 provides, in pertinent part, as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —
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> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .

5 U.S.C. § 706(2)(A).

See Id.; Louis L. Jaffe, *Judicial Control of Administrative Action*, 589-90 (1965) ("I have suggested that normally the courts should tolerate agency law making which does not in the courts' opinion seem clearly contrary to the statutory purposes as the courts understand them."). The doctrine is rooted in the sensible notion that when Congress confers authority on an agency to apply a statute, it is appropriate to infer from that Congressional grant of authority that Congress "would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute... ." *United States v. Mead*, 533 U.S. 218, 230 (2001). According to the Supreme Court, in such circumstances, a reviewing court is not free to substitute its judgment for that of the agency, "but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable." *Id.* And importantly, the Supreme Court has also made clear that this deference extends to the resolution of statutory ambiguities which, as here, were arrived at through formal adjudication.[14] From these principles and

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[14] See *SEC v. Zandford*, 535 U.S. 813, 819-20 (2002) (holding that the SEC's interpretation of the Securities and Exchange Act in the context of formal adjudication is entitled to deference if it is reasonable); *Mead*, 533 U.S. at 230 n.12 (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (applying *Chevron* deference to a decision of the Board of Immigration Appeals); *Federal Employees v. Department of Interior*, 526 U.S. 86, 98-99 (1999) (applying *Chevron* deference to Federal Labor Relations Authority's interpretation of the Federal Service Labor-Management Relations Statute); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 409 (1996) (giving deference to a statutory interpretation of the National Labor Relations Board); *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 324 (1994) (same); *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503

(continued...)

authorities it follows that the IBLA's interpretation of the STA's mineral reservation merits deference if the proceeding was sufficiently formal to ensure the "fairness and deliberation that should underlie a pronouncement" of law. *Mead*, 533 U.S. at 230.

The STA specifically grants to the Secretary of the Interior authority over the disposition of the mineral estates reserved to the United States.[15] In addition, Congress has granted to the Secretary of the Interior general authority to enforce the terms of mineral reservations.[16] Pursuant to this

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(...continued)

U.S. 407-417-18 (1992) (applying *Chevron* deference to the Interstate Commerce Commission's interpretation of the Rail Passenger Service Act); *Norfolk & Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 128 (1991) (same); *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 644-45 (1990) (applying *Chevron* deference to the Federal Labor Relations Authority's interpretation of the Federal Service Labor-Management Relations Statute); *Department of Treasury, IRS v. FLRA*, 494 U.S. 922, 928 (applying deference to the Federal Labor Relations Authority's interpretation of the Civil Service Reform Act)).

[15] *See* STA, 68 Stat. 239 ("Patents for all tracts purchased under the provisions of this Act shall contain a reservation to the United States of the oil, gas, and all other mineral deposits, together with the right to prospect for, mine and remove the same under applicable law and such regulations as the Secretary may prescribe.").

[16] *See* 43 U.S.C. § 1201 ("The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into

(continued...)

authority, the Secretary has promulgated regulations delegating to the IBLA the authority to decide appeals of decisions of the Bureau of Land Management concerning "the use and disposition of public lands and their resources" and "the use and disposition of mineral resources in certain acquired lands of the United States." 43 C.F.R. § 4.1(b)(3). A party who is adversely affected by a decision of the BLM may generally appeal that decision to the IBLA under 43 C.F.R. 4.410, and is then entitled to formal procedures set fort in the regulations, which, as the record indicates, ensure an adequate opportunity to present legal arguments.[17] Because Congress has conferred on the DOI the authority to implement the statute in question, and because the DOI has done so pursuant to a formal adjudicative process, its interpretation of the STA must be upheld if it is reasonable.

This conclusion finds firm support in Supreme Court decisions indicating that the IBLA's interpretations of statutes administered by the DOI are due deference on judicial review. *See Andrus v. Idaho*, 445 U.S. 715, 729 (1980) ("[W]e have in other cases accorded a considerable

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(...continued)

execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.").

[17] *See generally*, 43 C.F.R. 4.400-4.423 (Title 43, Subtitle A, Part 4, Subpart E "Special Rules Applicable to Public Land Hearings and Appeals") and 43 C.F.R. 4.20-4.31 (Title 43, Subtitle A, Part 4, Subpart B "General Rules Relating to Procedure and Practice").

deference to the responsible agency's construction of the statute which it administers."); *Bedroc*, 541 U.S. at 192 (citing "deference owed to the executive agency that has consistently construed the mineral reservations in land grant statutes as including sand and gravel." (Stevens, J., dissenting). While the Fourth Circuit has not directly addressed the deference due to statutory interpretations of the IBLA, other circuits have consistently deferred to the IBLA when its statutory interpretations are reasonable.[18] It follows, therefore, that where the STA "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

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[18] *See e.g. American Colloid Co. v. Babbitt*, 145 F.3d 1152, 1154-55 (10th Cir. 1998) (limiting its review of the IBLA's statutory interpretation to "the question [of] ... whether the agency's answer is based on a permissible construction of the statute, that is, whether the agency's construction is rational and consistent with the statute); *Brandt-Erichsen v. U.S. Dept. of Interior, Bureau of Land Mgmt.*, 999 F.2d 1376, 1381 (9th Cir. 1993) ([T]he decisions of the Interior Board of Land Appeals, a part of the Department of the Interior, on the meaning of a 'receipt upon final entry' for purposes of [The Confirmation Statute, 43 U.S.C. § 1165] should be given substantial deference."); *Chevron USA v. United States*, 923 F.2d 830, 834-35 (Fed. Cir. 1991) (deferring to the IBLA's interpretation of Outer Continental Shelf Lands Act); *Lipscomb v. United States*, 906 F.2d 545, 548-49 (11th Cir. 1990) (deferring to the IBLA's interpretation of the Color-of-Title Act, 43 U.S.C. § 1068); *Nevitt v. United States*, 828 F.2d 1405, 1406-07 (9th Cir. 1987) (deferring to the IBLA's interpretation of the cultivation requirement of 43 U.S.C. § 164).

B. The Interpretation of the STA's Reservation Clause

In determining whether the STA's mineral reservation of the "oil, gas, and all other mineral deposits" may reasonably be construed as including sand and gravel, the "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Bedroc*, 541 U.S. at 183. Here, however, there can be no doubt that the STA is infected with ambiguity stemming from the presence of the word "mineral." As the Supreme Court has noted, "the word 'minerals' is 'used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case.'" *Western Nuclear*, 462 U.S. at 42-43 (quoting *Northern Pacific R. Co. v. Soderberg*, 188 U.S. 526, 530 (1903)). And, as the Tenth Circuit has observed, even within the context of reservation clauses, the term mineral "is not capable of a definition of universal application, but is susceptible to limitation or expansion according to the intention with which it is used in the particular instrument or statute." *Bumpus v. United States*, 325 F.2d 264, 266 (10th Cir. 1963). Given that the term "mineral" as used in the STA is ambiguous, the issue becomes whether the IBLA's construction of that term in this case is based on a permissible reading of the STA. *See Chevron*, 467 U.S. at 843; *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

This is an issue of first impression, but it is not one on which no guidance exists. Instead, the Supreme Court has provided substantial guidance through its interpretation of other federal statutes with similar mineral reservations. *See BedRoc Ltd. LLC v. United States*, 541 U.S. 176 (2004); *Watt v. Western Nuclear*, 462 U.S. 36 (1983). It is instructive that in interpreting the mineral reservations in the statutes at issue in those cases, the Supreme Court considered (i) the plain meaning of the respective

reservations, (ii) the contemporary legal sources understanding of the meaning of the word mineral, and (iii) the purpose of the mineral reservation at issue.[19]

Though the meaning of the word "mineral" is ambiguous, the Supreme Court has given some direction on whether it includes sand and gravel. Thus, in *Western Nuclear*, 462 U.S. 36 (1983), the Supreme Court interpreted the Stock-Raising Homestead Act's (SRHA) reservation of "all the coal and minerals" on lands granted pursuant to the SRHA as encompassing deposits of gravel. *Western Nuclear*, 462 U.S. at 60. Over twenty years later, the Supreme Court interpreted a reservation of "all coal and other valuable minerals" contained in the Pittman Act of 1919 as not including sand and gravel.[20] *Bedroc Ltd., LLC v. U.S.*, 541 U.S. 176, 186 (2003). In distinguishing the

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[19] *See Bedroc*, 541 at 183-87 (relying on the text and the contemporary legal sources to interpret the Pittman Act's reservation); *Western Nuclear*, 462 U.S. at 50 (relying on the purpose of Congress's severance of the mineral estate from the surface estate).

[20] Chief Justice Rehnquist announced the judgment and delivered an opinion, in which Justices O'Connor, Scalia, and Kennedy joined. Justice Thomas filed an opinion concurring in the judgment, in which Justice Breyer joined. In contrast to the plurality, Justice Thomas did not think that the modifier 'valuable' was dispositive, but declined to extend the holding of *Western Nuclear* because he thought it was wrongly decided. *Bedroc*, 541 U.S. at 187-89 (Thomas J., concurring). Justice Stevens filed a dissenting opinion, in which Justices Souter and Ginsburg joined. Justice Stevens likewise did not think the modifier 'valuable' could reasonably differentiate the reservation of the SRHA from that of the Pittman Act, but thought that the decision of *Western Nuclear* demanded that the Pittman Act's reservation be interpreted as including sand and gravel. *Id.* at 189-92.

Pittman Act's reservation from that of the SRHA, the plurality placed heavy emphasis on the modifier "valuable" contained in the reservation:

> The SRHA's mineral reservation was identical to the Pittman Act's in every respect, save one: Whereas the SRHA reserved to the United States "all the coal and other minerals," the Pittman Act reserved "all the coal and other *valuable* minerals.

Id. at 181 (emphasis in original) (citations omitted). Thus, according to Justice Rehnquist's plurality *Bedroc* opinion, "the term 'valuable' makes clear that Congress did not intend to include sand and gravel in the Pittman Act's mineral reservation." *Id.* at 183-84. The implication for the interpretation of the STA's mineral reservation is clear: If the existence of the modifier "valuable" in *Bedroc* was necessary to distinguish th Pittman Act's mineral reservation from that of the SRHA, the absence of the word 'valuable' in the STA's mineral reservation compels the conclusion that the *Western Nuclear* holding is persuasive, if not controlling, and, therefore, the term "mineral deposits" in the STA's reservation includes sand and gravel. Thus, the IBLA reasonably concluded that "the language of the section 2 of the Small Tract Act cannot meaningfully be distinguished from that of section 9 of the SRHA of 1916, and it should be interpreted in the same way." *New West*, 164 IBLA 126, 135 (2004). This is strong support for the conclusion that the IBLA's construction of the term "mineral deposits" in this case is a permissible reading of the STA.

Also significant is the 1954 amendment of the STA reservation's original language reserving "oil, gas and other mineral deposits: to a reservation of "oil, gas and *all* other mineral deposits." *See New West*, 164 I.D. at 133. While the

addition of the word "all" was not commented upon by the drafters of the bill, the IBLA found it significant that Senator Watkins had stated generally that "[t]he language of the existing law has been rewritten throughout for clarity." *Id.* at 134 (citing *Congressional Record*, 83rd Cong., 2d Sess., 6644 (May 17, 1954). Legislative history aside, the clear import of the inclusion of the word "all" is that Congress intended the STA's mineral reservation to be given the broadest interpretation possible. *See Bedroc*, 541 U.S. at 183 ("The preeminent canon of statutory interpretation requires us to 'presume that the legislative says in a statute what it means and means what it says.'") (quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254-53 (1992)). Thus, the STA's 1954 amendment also supports the IBLA's construction of the STA in this case.

Yet additional support for this conclusion is found in the statutory context of the STA, namely mining laws in general. The *Bedroc* plurality buttressed its interpretation of the Pittman Act's reservation by noting that it explicitly cross-referenced the general mining laws. *Bedroc*, 541 U.S. at 185. According to the plurality, the implication of this cross-reference was that the class of minerals reserved by the Pittman Act was the same class of minerals subject to location under the General Mining Act of 1872 at the time of the Pittman Act's passage. *Id.* (citing the General Mining Act of 1872, 30 U.S.C. § 22). Shortly before the Pittman Act was passed, the Secretary of the Interior had held, in *Zimmerman v. Brunson*, 39 L.D. 310, 310 (1910), that sand and gravel were *not* locatable "valuable mineral deposits" under the General Mining Act. *Bedroc*, 541 U.S. at 185. It therefore followed that Congress, which was assumed by the Supreme Court to be aware of the *Zimmerman* decision when it passed the Pittman Act, did not consider sand and gravel to be "valuable minerals." *Id.*

Because the *Zimmerman* opinion was overturned by the Secretary of the Interior in the 1929 decision of *Layman v. Ellis*, 52 L.D. 714 (1929), it is reasonable to conclude that Congress intended to include sand and gravel in the STA's reservation. In deciding that sand and gravel were locatable minerals under the mining laws, the *Layman* decision noted the increasing commercial value of sand and gravel and cited publications wherein "sand and gravel have uniformly been classed as a mineral resource." *Layman*, 52 L.D. at 718. The *Layman* decision also cited U.S. Geological Survey Bulletins which list sand and gravel as "useful minerals" and as "mineral supplies." *Id.* Significantly, the *Layman* opinion was the governing law on whether sand and gravel were a "valuable mineral deposit" for purposes of the mining laws when the STA was originally passed in 1938 and when it was amended in 1954.[21] It follows, therefore, that when Congress passed the STA it did so with the understanding

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[21] in 1955 Congress passed the Common Varieties Act of 1955 in which Congress expressly withdrew "common varieties of sand, stone, gravel, pumice and pumicite" from location under the mining laws. Common Varieties Act, 30 U.S.C. § 611. The purpose of the Act "was to prevent mining locations on public lands containing these materials being made with a view to ultimately obtaining title to the lands." *Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676, 680 (10th Cir. 1986). According to the Tenth Circuit, "[t]here was a perceived abuse of the mining laws to so obtain title but to ultimately put the land to other purposes." *Id.* Thus, the 1955 Common Varieties Act does not indicate that Congress no longer considered sand and gravel a mineral, but that Congress believed it wise to allow the Secretary of the Interior to dispose of these "mineral materials" under the Materials Act of 1947. *See United States v. Coleman*, 390 U.S. 599, 604 (1968).

that the STA's reservation of the "oil, gas, and all other mineral deposits" would include sand and gravel.

This conclusion is buttressed by the contemporaneous regulations of the DOI implementing the STA. *New West*, 164 I.D. at 130-32. In 1940, pursuant to the STA's delegation of rulemaking authority, the DOI issued regulations designed to govern the United States' right to "prospect for, mine, and remove" its reservation of "oil, gas and other minerals" on STA land.[22] The regulations divided the mineral estate into two categories.[23] The first category included "coal, oil, gas or other minerals subject to

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[22] The original regulations provided:

> *Minerals.* Any deposits of coal, oil, gas or other minerals subject to the leasing laws, in the lands patented or leased under the terms of this law, may be disposed of to any qualified person under applicable laws and regulations in force at the time of such disposal. No provision is made at this time to prospect for, mine, or remove the other kinds of minerals that may be found in such lands, and until rules and regulations have been issued, such reserved deposits will not be subject to prospecting or disposition.

5 Fed. Reg. 2284, 2286 (June 19, 1940) (cited in *New West Materials*, 164 IBLA 126, 130 (2004)).

[23] This division of reserved minerals into two categories, one category subject to disposition under the leasing laws, and one category of minerals not subject to disposition, persisted in subsequent revisions of the regulations which occurred before the lands were patented. *See* 43 C.F.R. § 257.15, 12 Fed. Reg. 3664, 3666 (June 5, 1947); 43 C.F.R. § 257.15(a), 15 Fed. Reg. 6222, 62224 (September 16, 1950); 43 C.F.R. 257.15(a), 19 Fed. Reg. 8835, 9130 (December 23, 1954), 43 C.F.R. § 257.16, 20 Fed. Reg. 365, 368 (January 15, 1955) (cited in *New West*, 164 IBLA at 130-31).

the leasing laws" and were to be disposed of in accordance with the mineral leasing laws then in effect. The mineral leasing laws in effect at the time applied only to coal, phosphate, oil, oil shale, gas, sodium and potassium. Mineral Lands Leasing Act of 1920, ch. 85, § 1, 41 Stat. 437 (1920), *as amended*, Act of Feb. 7, 1927, ch. 66 § 5, 44 Stat. 1058 (1927) (current version at 30 U.S.C. § 181). The second category of the regulation included the "other kids of minerals," which were not subject to disposition. A reasonable, though not required inference is that sand and gravel were included in the regulation's second category of "all other minerals."[24]

Indeed, contemporary IBLA and judicial decisions adopted this inference. Just after the 1954 amendment and just prior to the issuance of the patents for the subject land, the IBLA confirmed that "[l]and under lease or patent pursuant to the Small Tract Act is not open to location under the mining laws" because the regulations provided the sole avenue for the disposition of a STA mineral estate. *The*

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[24] The regulations also serve to undercut the plaintiff's argument, based on the principle of *ejusdem generis*, that the specification of oil and gas in the reservation was intended to limit the class of minerals in the reservation to only valuable minerals. As reflected in the regulations, the STA's reservation listed oil and gas separately in recognition of the leasing laws which regulated their disposal, and not in order to limit the category of minerals described by the phrase "all other mineral deposits." *See Western Nuclear*, 462 U.S. at 44 n.5 ("The specific listing of coal in the reservation clause of the SRHA sheds no light on what Congress meant by the term 'minerals.' There were special reasons for expressly addressing coal that negate any inference that the phrase 'and other minerals' was meant to reserve only substances *ejusdem generis*."). *See also Millsap v. Andrus*, 717 F.2d 1326, 1329 n.5 (10th Cir. 1983).

Dredge Corp., 64 I.D. 368, 368 (1957). In reviewing this opinion, the district court interpreted the second category of the regulation as –

> clearly stating that "No provision is made at this time to prospect for, mine, or remove the other kinds of minerals (sand and gravel included) that may be found in such lands, and until rules and regulations have been issued, such reserved deposits will not be subject to prospecting."

the Dredge Corp. v. Penny, Civ. No. 475 (D.Nev. 1964) *affirmed by Dredge Corp. v. Penny*, 362 F.2d 889 (9th Cir. 1966).[25] The inclusion of the parenthetical text in the district court's quotation of the regulation indicates that sand and gravel were the "other kinds of mineral" the regulation intended to cover. Thus, the regulations demonstrate that the DOI's contemporaneous understanding of the STA's mineral reservation was that it included and gravel.

Congress' passage of the Materials Act of 1947, reflects that Congress likely shared the DOI's view that the STA's mineral reservation included and gravel. In that Act, Congress gave the DOI the authority to "dispose of mineral materials (including but not limited to common varieties of the following: sand, stone, gravel, pumice, cinders and clay) ...." Materials Act of 1947, 30 U.S.C. § 601. This plain indication of Congress' understanding of whether sand and

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[25] The district court's opinion is not reported, but the quotation from its decision is found in *Frank Melluzo*, 72 I.D. 21, 24 (1965) (holding that the STA regulation prevented the location of a mining claim for building stone on STA land).

gravel were minerals occurred just eight years after the STA was originally passed and seven years before the STA's reservation was amended to include the word "all," and therefore buttresses the conclusion that "all other mineral deposits" includes sand and gravel. *See Bedroc*, 541 U.S. at 184 ("[T]he proper inquiry focuses on the ordinary meaning of the reservation at the time Congress enacted it.").

Finally, Congress' purpose in reserving the mineral estate of STA land also supports a conclusion that the IBLA's construction of the STA in this case is reasonable and permissible. As the Supreme Court explained in *Western Nuclear*, "Congress' underlying purpose in severing the surface estate from the mineral estate was to facilitate the concurrent development of both surface and subsurface resources." *Western Nuclear*, 462 U.S. at 47. Just as Congress would not have expected the ranchers and farmers who received grants pursuant to the SRHA to exploit the subsurface estate, Congress likewise could not have expected the homeowners or small business owners of five acre plots to exploit the subsurface estates sold or leased pursuant to the STA. *Compare* SRHA, 43 U.S.C. § 292 (authorizing the Secretary to designate lands "chiefly valuable for grazing and raising forage crops") *with* STA, (authorizing the Secretary to designate land "chiefly valuable for residence, recreation, business or community site purposes"). Thus, in addition to the text of the reservation and the contemporary legal understanding of the word "minerals," Congress' purpose in reserving the mineral estate supports the IBLA's construction of the STA's reservation.

Plaintiffs resist this conclusion by arguing that because the subject land was made up largely of sand and gravel, Congress could not have intended to include sand and gravel in the phrase "all other mineral deposits" lest the reservation swallow up the surface estate. *See Bedroc*, 541

U.S. at 182 n.4 (quoting *Western Nuclear*, 461 U.S. at 71-72 (Powell, J., dissenting)). *See also, Farrell v. Sayre*, 270 P.2d 190, 192-93 (Colo. 1954) ("[T]he word 'minerals' when found in a reservation out of a grant of land means substances exceptional in use, in value, and in character and does not mean the ordinary soil of the district which if reserved would practically swallow up the grant."). The well-recognized principle that a reservation of minerals does not include sand and gravel if they comprise a significant part of the soil is appropriate in the context of private transactions involving a specific piece of land with a definite soil composition.[26] Courts sensibly assume that the parties in such private transactions did not intend to reserve a significant part of the surface estate in the mineral reservation. But such private transactions stand in sharp contrast to the purpose and content of the STA. When Congress passed (and later amended) the STA it did not have a specific piece of land in mind, but public lands were generally across the country.[27] In amending the STA, Congress made clear that it intended to reserve "all other mineral deposits" in public lands across the country, and while some of the surface estates sold or leased pursuant to the STA may have been comprised largely of sand and

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[26] *See, e.g., Clay, Sand, or Gravel as "Minerals" Within Deed, Lease, or License*, 95 A.L.R.2d 843 § 5 (citing *Psenick v. Wessels*, 205 SW2d 658 (Tex. Civ. App, 1947); *West Virginia Dept. of Highways v. Farmer*, 226 S.E.2d 717 (W.Va. 1976)).

[27] *See* STA, 68 Stat. 240, § 1 (allowing the Secretary of the Interior to designate as STA land "any vacant, unreserved public lands"), § 4 (creating special provisions for the sale or lease of STA land to DOI employees stationed in Alaska), § 5 (extending the act to former railroad grants in Oregon).

gravel, others certainly were not. Because it is unlikely that Congress intended the meaning of the STA's mineral reservation to change depending on the soil composition of the particular five acre tract at issue, the general principle that a mineral reservation does not include sand and gravel if they comprise a significant part of the soil loses its force.

Nor is it persuasive to argue, as plaintiffs do, that the IBLA's reading of the STA is unreasonable because including sand and gravel in the mineral reservation would allow disruption of the surface estate should the United States choose to exploit its mineral estate by the extraction of sand and gravel. This argument overlooks the fact that virtually any type of drilling or mining operation to exploit the mineral estate is likely to disrupt the five acres comprising a STA surface estate. Thus, the potential disruption of the surface estate provides no basis for attacking the reasonableness of the IBLA construction of the STA.

Along the same line, plaintiffs also argue that while it is reasonable to assume that STA parcel purchasers accepted the risk to the surface estate of oil and gas exploitation, it is not reasonable to make the same assumption regarding sand and gravel. This is so, plaintiffs argue, because the STA parcels in the area in issue are composed chiefly of sand and gravel. But this argument is also unpersuasive; it confuses the prevalence of sand and gravel with the risk that it would be exploited. As the record reflects, there was no significant local market for sand and gravel in the Arizona desert in 1959, and therefore, it follows that the risk of sand and gravel mining is not likely to have concerned the original STA parcel purchasers any more than the risk of oil or gas exploration. When the surface estate was purchased by various patentees in 1959, and again when it was purchased by JWR, the purchasers accepted the risk that the United

States might choose to exploit its mineral estate, which included not only the uncommon and valuable minerals of oil and gas, but the common and relatively less valuable minerals of sand and gravel. This risk was presumably captured by a reduction in the land's price. *See* James L. Huffman, *the Allocative Impact of Mineral Severance: Implications for the Regulation of Surface Mining*, 22 Nat. Resources J. 201, 203 (1982). It is worth noting in this regard, only because it is relevant to the risk of surface estate destruction by the reservation of sand and gravel, that the sand and gravel mining operation at issue in the present case was not begun by permission of the United States as the owner of the mineral estate, but by the lessor of the surface estate. Thus, it is not unreasonable to assume that Congress would expect the purchasers to accept the risk of sand and gravel exploitation on their land.

Plaintiffs also fail to consider the disruption to the United States' mineral estate that results from the plaintiffs' operation of a sand and gravel mining operation of 28 foot pits spread over roughly six and one half acres. It would be quite difficult to sustain an oil drilling or mining operation simultaneous with a sand and gravel mining operation of this magnitude. As common sense indicates, "the word 'mineral' is evidently derived from 'mine' as being that which is usually obtained from a mine." *See Mines and Minerals*, 58 CJ2d § 4(a) (1998) (citing *Brady v. Smith*, 73 N.E. 963 (N.Y. 1905)). thus, it is reasonable to assume that when Congress reserved to itself the "oil, gas and all other mineral deposits"

on STA land, it intended any large scale mining operation would take place with the government's permission.[28]

Nor is the IBLA's construction of the mineral reservation defeated by plaintiffs' argument that the STA's lack of a provision providing for compensation to the surface estate owner for damage caused by exploitation of the mineral state reflects congressional intent not to include sand and gravel in the mineral estate. In *Western Nuclear*, the Supreme Court noted that because the SRHA specifically allowed mineral prospectors access to the mineral estate of SRHA land, it also included a provision protecting the interests of the surface estate owners by providing for compensation should the exploitation of the subsurface estate by mineral prospectors damage the surface estate. *Western Nuclear*, 462 U.S. at 51 n.11. Plaintiffs contend that the absence of a similar provision in the STA indicates an intent not to reserve sand and gravel, lest the surface estate owners be left without a remedy for the damage done to the surface estate by exploitation of the mineral estate. This argument overstates the significance of this difference between the two statutes. A provision for compensation to the surface estate owners was not necessary in the STA because Congress did not provide a specific right for prospectors to enter upon the land. Instead, Congress entrusted to the DOI the authority to

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[28] While the disruption to the mineral estate of a six and one half acre, 28 foot deep mining operation is obvious, the question arises whether the reservation of mineral rights would preclude a surface estate owner from using a relatively minor amount of sand and gravel for non-commercial purposes. Presented with this hypothetical situation, government counsel said that use would still amount to a trespass, but the DOI would almost certainly raise no objection to it.

manage potential conflicts between the rights of the surface estate owners and those exploiting the United States' mineral estate.[29] As already noted, the DOI's regulations, in force between 1940 and 1980, provided for the exploitation of only those materials subject to the mineral leasing laws, and made no provision for the exploitation of other kinds of minerals.[30] When the STA was repealed by the passage of the FLPMA, the regulations promulgated pursuant to the STA's delegation were rescinded,[31] and the disposal of any minerals contained in a STA reservation, which were specifically preserved by the FLPMA,[32] became subject, by default, to disposition under the Materials Act of 1947.[33] 30

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[29] 69 Stat. 239 ("Patents for all tracts purchased under the provisions of this Act shall contain a reservation to the United States of the oil, gas, and all other mineral deposits, together with the right to prospect for, mine, and remove the same under applicable law and such regulations as the Secretary may prescribe.").

[30] *See supra* notes 22-24 and accompanying text.

[31] *See* 51 Fed. Reg. 3599 (January 29, 1986); 45 Fed. Reg. 39416, 39420 (June 10, 1980).

[32] FLMPA § 701(a), 43 U.S.C. § 1701(a) ("Nothing in this Act shall be construed as terminating any valid lease, permit, patent, right of way or other land use authorization existing on the date of approval."); FLPMA § 701(c), 43 U.S.C. § 1701(c) ("All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law.").

[33] The Materials Act provides:

> The Secretary, under such rules and regulation as he may prescribe, may dispose of mineral materials (including but not limited to common varieties of the

(continued...)

U.S.C. § 601. And pursuant to that act, the DOI has promulgated regulations governing disposition of minerals contained in United States mineral reservations, which authorize the use of sales contracts to dispose of mineral materials subject to the Act.[34] To date, the BLM in Phoenix has exercised its discretion under the regulations to dispose

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(...continued)

> following: sand, stone, gravel, pumice, pumicite, cinders and clay) ... on public lands of the Untied States ... if the disposal of such mineral ... (1) is not otherwise expressly authorized by law, ... and (2) is not expressly prohibited by laws of the United States, and (3) would not be detrimental to the public interest. Such material may be disposed of only in accordance with the provisions of the Act and upon payment of adequate compensation therefore, to be determined by the Secretary.

Materials Act of 1947, 30 U.S.C. § 01. The DOI's position is that "public lands" includes mineral estates reserved to the United States. *See* Final Rule: Mineral Materials Disposal:

> One comment stated that it should be made clear in the definition of "public lands" that "any lands and interest in lands" includes the mineral estate. The definition we used in the proposed rule is the standard definition, derived from the Federal Land Policy and Management Act of 1976 (FLPMA), which certainly intends to include the mineral estate. The public generally understands this. 66 Fed. Reg. 58892, 58892.

[34] *See* 43 C.F.R. 3600 et. seq.

of mineral materials such as sand and gravel on STA land, but only in situations where the surface estate owner is the party attempting to mine the subsurface estate.[35] Thus, as demonstrated by 67 years of experience, it is reasonable to conclude that Congress intended to entrust the DOI with protecting the interests of the surface estate owners from damage resulting from sand and gravel mining, and therefore, the absence of a specific provision compensating surface estate owners for damage to their land is not persuasive evidence that the mineral reservation did not include sand and gravel.

Finally, plaintiffs cite a number of other federal[36] and state[37] cases interpreting the mineral reservations included in

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[35] *See* Garrett Declaration ¶ 8 (Exhibits to Plaintiffs' Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment, Exhibit 13).

[36] *See, e.g., United States v. Hess*, 348 F.3d 1237 (10th Cir. 2003) (holding that sand and gravel was not included in a reservation of "all minerals ... including oil and gas" contained in the Indian Reorganization Act of 1934); *Burkey v. United States*, 25 Cl. Ct. 566 (U.S. Cl. Ct. 1992) (holding that a reservation of "all gas, oil and minerals" within a property grant to the United States did not include sand and gravel); *Poverty Flats Land and Cattle Co. v. United States*, 788 F.2d 676, 681 (10th Cir. 1986) (holding that caliche rock was not included in the Taylor Grazing Act's reservation of "all mineral deposits."); *Cumberland Mineral Co. v. United States*, 513 F.2d 1399, 1402 (U.S. Cl. Ct. 1976) (holding that a private party did not reserve sandstone and clay in a grant to the United States as part of its reservation of "the mineral, oil, and gas" of the land.); *Bumpus v. United States*, 325 F.2d 264, 267 (10th Cir. 1963) (holding that a reservation of "oil, gas and other minerals" in land taken by the United States did not include gravel).

other statutes and private agreements as not including sand and gravel. These citations, however, cannot overcome the clear implication of the Supreme Court's decisions in *Western Nuclear* and *Bedroc*, which, unlike the decisions cited by plaintiff, are binding here. These Supreme Court decisions interpreting similar mineral reservations, together with the evidence drawn from contemporary legal sources, convincingly demonstrates that the IBLA's interpretation is a "permissible construction." *Chevron*, 467 U.S. at 843. For these reasons, the plaintiffs' motion for summary judgment

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(...continued)

[37] *See, e.g., Miller Land and Mineral Co. v. State Hwy. Comm'n of Wyoming*, 757 P.2d 1001, 1003 (Wyo. 1988) (holding that a private reservation of all "mineral[s] and mineral rights" does not include gravel); *Rysavy v. Novotny*, 401 N.W.2d 540, 542-43 (S.D. 1987) (distinguishing *Western Nuclear* and holding that a reservation of "one/half (½) of all the mineral rights" on land does not include extraction of rock when to do so would destroy the surface estate); *W.Va. Dept. of Highways v. Farmer*, 226 S.E.2d 717 (W. Va. 1976) (holding that a reservation of the "oil, gas and other minerals" did not include sand and gravel); *Elkhorn City Land Co. v. Elkhorn City*, 459 S.W.2d 762 (Ky. 1970) (holding that a reservation of the "coal, oil, gas and minerals and mineral substances" did not include sand clay loam and sandy shale); *Fisher v. Keweenaw Land Ass'n*, 124 N.W.2d 784 (Mich. 1963) (holding that a reservation of "ores and minerals" did not include sand and gravel); *Witherspoon v. Campbell*, 69 S.2d 384 (Miss. 1954) (holding that reservation of "all minerals, both liquid and solid" did not include sand and gravel).

must be denied and the defendants' motion for summary judgment must be granted. An appropriate Order will issue.

/s/ T.S. Ellis, III
T.S. Ellis, III
United States District Judge

Alexandria, VA
October 28, 2005

APPENDIX D

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS, INTERIOR BOARD OF LAND APPEALS

NEW WEST MATERIALS

IBLA 2002-183

Decided Dec. 2, 2004

OPINION BY ADMINISTRATIVE JUDGE IRWIN

In 1959, the Phoenix, Arizona, office of the Bureau of Land Management (BLM) issued patents to individuals that granted several contiguous 5-acre lots in sec. 7, T. 4E., R. 1 N., Gila and Salt River Meridian, in accordance with the authority provided in the Small Tract Act, 43 U.S.C. § 682a (1970).[39] The patents reserved to the United States "all oil,

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[39] Section 1, Ch. 270, 68 Stat. 239, 43 U.S.C. § 682a (1970), repealed by Pub. L. 94-579, Title VII, § 702, 90 Stat. 2789 (1976).

The lots involved are 13-24 and 26-28. The Act authorized sale or lease of tracts "not exceeding five acres"; eight of the fifteen patents granted approximately 5.9 acres. The Act provided that "no person shall be permitted to purchase more than one tract;" on June 23, 1959, Patent Numbers 1196670-1196675 were issued to Wilbur, Charles, Lucretia, Alan, Genevieve, and Edythe Bayham for lots 13-18.

gas and other mineral deposits, in the lands so patented, together with the right to prospect for, mine, and remove the same according to the provisions of said Act of June 1, 1938."[40]

The lots remained vacant until most of them were acquired in August 2000 by JWR, Inc., of Imperial, California.[41] JWR leased them to New West Materials (New West) to mine sand and gravel. In November 2001 BLM notified New West's operations manager that it was of the opinion "that mineral material has been removed and sold from the * * * Federal Mineral estate, without a contract, in violation of" Revised Statute 2478 and 43 U.S.C. § 1201[42] and 43 CFR 3603.1 and 9239.[43] New West responded it did

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[40] The Small Tract Act was originally enacted on June 1, 1938. Ch. 317, 52 Stat. 609.

[41] Maricopa County Assessor's Office Secured Master List for Tax Year 2001, pages 131,201 and 131,206-131,210.

[42] 43 U.S.C. §1201 (2000) authorizes the Secretary to implement provisions of Title 43 of the United States Code by appropriate regulations.

[43] 43 CFR 3603.1 (2001) provided: "Unauthorized use. Except when authorized by sale or permit under law and the regulations of the Department of the Interior, the extraction, severance or removal of mineral materials from public lands under the jurisdiction of the Department of the Interior is unauthorized use. Unauthorized users shall be liable for damages to the United States, and shall be subject to prosecution for such unlawful acts (see subpart 9239 of this title)."

43 CFR 9239.0-7 provides: "Penalty for unauthorized removal of material. The extraction, severance, injury, or removal of timber or other vegetative resources or mineral materials from public

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not believe the sand and gravel were covered by the reservation.

On January 3, 2002, BLM issued a Notice of Trespass to New West and JWR for "an act of non willful trespass by removing and selling mineral material (sand and gravel) without a valid contract, from the above-referenced lands."[44] Both New West and JWR appealed.[45]

The Small Tract Act was originally enacted in 1938 to "provide for the purchase of public lands for home and other sites," i.e., for "a home, cabin, camp, health,

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lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States, and will be subject to prosecution of such unlawful acts."

[44] 43 CFR 3603.1 was revised, effective shortly before BLM issued its Notice, but its substance was not changed. *See* 43 CFR 3601.71 and 3601.72, 66 FR 58892, 58898, col. 1, 58904, col. 3 (November 23, 2001).

[45] In January 2003 JWR's appeal was dismissed for failure to file a statement of reasons for appeal; in September 2003 we granted JWR's motion to intervene in this appeal. In April 2002, we issued a stay of BLM's decision, conditioned, among other things, on New West's posting a bond to cover any eventual royalties.

convalescent, recreational, or business site."[46] The House Committee on the Public Lands report on the bill incorporated a letter from Charles West, Acting Secretary of the Interior, with the following explanation:

> In the public domain there are millions of acres of public lands that are not suitable for agricultural use or for grazing. Much of this land is suitable for use as home, health, business, or recreational sites.
>
> Enactment of the proposed bill would permit those in need of the benefits of a desert climate to obtain home sites in such places, permit the acquisition of lands along highways for use as overnight cabin, gas station, or store sites, permit the purchase of lands suitable for such purposes for muskrat raising, and permit the purchase of mountain as well as desert land for use as a recreational, convalescent, and health sites.
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> As the classification of the land as chiefly valuable for the use for which it is desired is a prerequisite to its sale, it is believed that the enactment of the proposed bill will in no manner interfere with the administration of other public land laws and will fill a need that has long existed for a method for the disposal, under proper restrictions, of small tracts of land to

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[46] Ch. 317, 52 Stat. 609.

those who have need therefore.[47]

Representative Izak, who introduced the bill, explained to his colleagues that it was "offered primarily in the interest of war veterans, to permit them to take up a little piece of ground out in the desert."[48]

The Senate Committee on Public Lands and Surveys amended the House bill by adding language that authorized the Secretary to lease as well as sell tracts and a provision that the law would not apply to lands in the Territory of Alaska.[49] Senator McCarran, who introduced the bill in the

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[47] House Report No. 1876, 75th Cong., 3rd Sess., dated March 3, 1938, to accompany H.R. 8008, at 1-2, quoting an August 7, 1937, letter to the Hon. Rene L. DeRotten, Chairman, Committee on the Public Lands.

[48] *Congressional Record*, 75th Cong., 3rd Sess., at 5490 (April 18, 1938).

[49] Senate Report No. 1715, 75th Cong., 3rd Sess., dated April 20, 1938, to accompany H.R. 8008, at 1. The Senate report included a letter from Charles West dated December 18, 1937, to the Hon. Alva B. Adams, Chairman, Committee on Public Lands and Surveys with the same language as in the letter to the House Committee. It also included a February 23, 1938, letter from M. L. Wilson, Acting Secretary of Agriculture, to R. F. Carmalier, Clerk, committee on Public Lands and Surveys, stating in part:

"Your attention is drawn to the fact that the bill authorizes an outright sale of 5-acre tracts of land within areas reserved by the Secretary of the Interior for other purposes, and, although the sales are to be made under rules and regulations prescribed by the Secretary, it will probably be very difficult to limit the subsequent uses of such tracts, once sales by the Government have passed fee-

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Senate, stated that the bill "provides that when, in the opinion of the Secretary of the Interior, small isolated tracts of land throughout the various sections of the public domain should be sold or leased, they may be sold or leased. For instance, there are places where there are small tracts of land, say 5 acres in a tract, which may be utilized for little homestead purposes, such as service stations, and the like."[50]

As introduced and enacted, the Small Tract Act included a proviso "that patents for all tracts purchased under the provisions of this Act shall contain a reservation to the United States of the oil, gas, and other mineral deposits, together with the right to prospect for, mine, and remove the

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simple titles to individuals. While it is probably desirable to make some provision for the kinds of sites and for the uses specified in the bill (so far as these sites and uses are not inconsistent with the principal purpose to which given larger tracts of public lands may have been devoted), it is a question whether this should not be done under some system of revocable permits or licenses granting a privilege to use the tract in question for the specific purpose, and not giving a fee-simple title. A considerable number of such licenses have been granted in the national forests, where the system has permitted a variety of uses, such as those described in this bill, without subjecting the forests to the uncontrolled uses which fee-simple titles to small tracts might encourage."

Id. at 3.

[50] *Congressional Record*, 75th Cong., 2d Sess., at 6275.

same under such regulations as the Secretary may [prescribe]."[51]

The regulations that the Secretary has prescribed have consistently limited this right to exploit reserved minerals to leasable minerals. The original regulations were contained in Circular 1470, dated June 10, 1940. 43 CFR 257.14 provided:

> *Minerals*. Any deposits of coal, oil, gas or other *minerals subject to the leasing laws*, in the lands patented or leased under the terms of this law, may be disposed of to any qualified person under applicable laws and regulations in force at the time of such disposal. No provision is made at this time to prospect for, mine, or remove *the other kinds of minerals* that may be found in such lands, and until rules and regulations have been issued, such reserved deposits will not be subject to prospecting or disposition.

5 FR 2284, 2286 (June 19, 1940) (emphasis supplied).

This regulation was revised in 1947, but the distinction between minerals subject to the leasing laws and other kinds of minerals was maintained:

> § 257.15. *Minerals*. Any lease or patent issued under the act will reserve to the United States (a) all deposits of coal, oil, gas or other minerals,

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[51] Ch. 317, 52 Stat. 609.

> together with the right to prospect for, mine, and remove the same under such regulations as the Secretary may prescribe * * *. Any *minerals subject to the leasing laws*, in the lands patented or leased under the terms of the act may be disposed of to any qualified person under applicable laws and regulations in force at the time of such disposal. No provision is made at this time to prospect for, mine, or remove *the other kinds of minerals* that may be found in such lands, and until rules and regulations have been issued, such reserved deposits will not be subject to prospecting or disposition.

12 FR 3664, 3666 (June 5, 1947) (emphasis supplied).[52]

In *The Dredge Corporation*, 64 I.D. 368 (1957), the appellant argued it could locate mining claims on lands that had previously been classified for disposition under the Small Tract Act. The Deputy Solicitor held

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[52] 43 CFR 257.15(a), as revised in September 1950, provided the same, 15 FR 6222, 6224 (September 16, 1950), as did the revision published in December 1954. 19 FR 8835, 9130 (December 23, 1954).

In January 1955 this regulation was renumbered and its last sentence was revised slightly to read:

§ 257.16 *Minerals; timber.* (a) * * * Until rules and regulations have been issued, the other kinds of minerals that may be found in such lands are not subject to prospecting or disposition.

20 FR 365, 368 (January 15, 1955). This regulation was in effect when BLM issued the patents in 1959.

that was not so.[53] On appeal, the U.S. District Court for the District of Nevada rendered summary judgment for the Secretary:

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53 "Among the regulations adopted by the Secretary is one (43 CFR, 1956 Supp., 257.16) which provides that leases, like patents, will reserve to the United States all deposits of coal, oil, gas, or other minerals, together with the right to prospect for, mine, and remove the same under such regulations as the Secretary may prescribe. The regulation provides further that while minerals subject to the leasing laws (30 U.S.C., 1952 ed., sec. 181 *et seq.*) in lands patented or leased under the Small Tract Act may be disposed of under applicable laws and regulations in force at the time of such disposal, other kinds of minerals which may occur in such leased or patented lands are not subject to prospecting or disposition until regulations have been adopted.

"As the act provides that reserved minerals in lands subject to its provisions may be prospected for, mined, and removed only under applicable law and such regulations as the Secretary may prescribe and as the Secretary has not to date prescribed regulations permitting prospecting on lands under lease or patent pursuant to the Small Tract Act, it follows that those lands are not subject to location under the mining laws.

"The appellant contends that the fact that the Secretary has issued no regulations relating to mining on those lands is proof that the mining laws apply. This is not so. The act makes the reserved minerals subject to disposition only under applicable laws 'and such regulations as the Secretary may prescribe.' The Secretary has prescribed that there shall be no prospecting for or disposition of the reserved deposits

(continued...)

The next issue raised by plaintiff is that the Secretary's acts of issuing the regulation found in 43 CFR. Sec. 257.15 then failing to issue further regulations dealing with the disposal of minerals not subject to the Mineral Leasing Act made the land in question open to location under the mining laws.

The Small Tract Act provided that the Secretary of the Interior has discretion to sell of lease land "under rules and regulations as he may prescribe." The Secretary issued a regulation (43 C.F.R. Sec. 257.15) clearly stating that "No provision is made at this time to prospect for, mine, or remove the other kinds of minerals (sand and gravel included) that may be found in such lands, and until rules and regulations have been issued, such reserved deposits will not be subject to prospecting." Similar to his discretionary powers granted under the Mineral Leasing Act, under the Small

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at this time and until he prescribes regulations permitting the prospecting, for mining and removal of such reserved deposits the lands in which such deposits may be found and are not open to location under the mining laws."

64 I.D. at 373-74 (footnote omitted).

> Tract Act the issuance of regulations is a matter of the Secretary's discretion.[54]

This decision was affirmed. *The Dredge Corporation v. Penny*, 362 F.2d 889 (9th Cir. 1966).[55]

In 1954, the Congress amended the Small Tract Act. It did so in response to a request that the Secretary of the Interior initially made in 1948. The Secretary explained that one of the principal purposes for the request was to "add community site purposes to those for which sites may be leased or sold. The term 'community site purposes' would include municipal uses as well as such common public uses as general meetings and educational, civic, and religious activities."[56]

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[54] *The Dredge Corporation v. Penny* (U.S.D.C., D. Nev., Civil No. 475, May 18, 1964). The District Court's decision is not reported. The quotation from its decision is found in *Frank Melluzz*, 72 I.D. 21, 24 (1965). The parenthetical language "(sand and gravel included)" in the quotation from the District Court's decision is not in the text of 43 CFR 275.15.

[55] "The Act does not provide that reserved minerals shall continue open to entry and location. Instead it leaves to the Secretary the question of how and to what extent they shall be made available. In our judgment the Regulation was a proper exercise of administrative discretion under the Act." *The Dredge Corporation v. Penny* 362 F.2d 889 (9th Cir. 1966) at 890.

[56] House Report No. 2212, 80th Cong., 2nd Sess., June 4, 1948, to accompany H.R. 5555, at 2, quoting a February 20, 1948, letter from Oscar L. Chapman, Acting Secretary of the Interior, to the Hon.

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The Department's proposed bill also changed the language of the 1938 Act requiring that any patent for purchase of a tract contain a reservation of the oil, gas, and other mineral deposits. Section 2 read: "Patents for all tracts purchased under the provisions of this act shall

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Joseph W. Martin, Jr., Speaker of the House of Representatives. The letter continued:

"The number of uses for which the tracts may be leased or sold would be reduced to four principal classifications – residence, recreation, business, and community site – instead of the present unwieldy seven. The other present uses will fit into the proposed four classes. This change is suggested in order to simplify the administration of the act and to provide greater flexibility in classification for lease or sale purposes."

Subsequent reports repeated this explanation. House Report No. 318, 81st Cong., 1st Sess., March 25, 1949, to accompany H.R. 2820, at 2, quoting a February 25, 1949, letter from Oscar L. Chapman, Under Secretary of the Interior, to Hon. Andrew J. Somers, Chairman, Committee on Public Lands; House Report No. 344, 83rd Cong., 1st Sess., May 5, 1953, to accompany H.R. 2512, at 2-3 quoting a December 17, 1951, letter from Dale E. Doty, Assistant Secretary of the Interior, to the Hon. Sam Rayburn, Speaker of the House of Representatives; Senate Report No. 1330, 83rd Cong., 2nd Sess., May 13, 1954, to accompany H.R. 2512, quoting a July 29, 1953, letter from Assistant Secretary of the Interior Orme Lewis to the Hon. Hugh Butler, Chairman, Committee on Interior and Insular Affairs, 1954 *U.S. Code Congressional and Administrative News* at 2532. *See* section 1, Ch. 270, 68 Stat. 239. 43 U.S.C. § 682a (1970).

contain a reservation to the United States of the oil, gas, and *all* other mineral deposits, together with the right to prospect for, mine, and remove the same under such regulations as the Secretary may prescribe" (emphasis supplied).[57] The word "all" was added, but no comment on that addition was made by the Department or by the committees that considered the bill. In the Senate, Senator Watkins offered the following explanation:

> The purpose of this bill is to modernize the so-called Small Tract Act, to extend its application and improve its administration.
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> The language of the existing law has been rewritten throughout for clarity. Most of the changes are not important. The most important change is to permit the leasing of small tracts, even though unsurveyed. This provision will be of particular value in Alaska, where most of the land is not surveyed. The bill also extends the leasing authority to small tracts in the O and C lands in Oregon, but with appropriate safeguards.
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> The bill should do much to stimulate the development of Alaska.[58]

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[57] House Report No. 2212, 80th Cong., 2nd Sess., June 4, 1948, at 3; House Report No. 318, 81st Cong., 1st Sess., March 25, 1949, at 3; House Report No. 344, 83rd Cong., 1st Sess., May 5, 1953, at 5.

[58] *Congressional Record*, 83rd Cong., 2nd Sess., 6644 (May 17, 1954).

The enactment of the 1954 amendment brought section 2 of the Small Tract Act into close alignment with section 9 of the Stock-Raising Homestead Act of 1916 (SRHA).[59] That section required that all patents issued under that Act contain a reservation "to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same."

The Supreme Court decided the reservation in section 9 of the SHRA included gravel in *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983). The Court noted that the Congress intended, in severing the surface estate from the mineral estate, to encourage concurrent development of the surface and the subsurface of the land. *Id.* at 50. For this reason, the Court said, "the determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated." *Id.* at 52.

> Given Congress' understanding that the surface of SHRA lands would be used for ranching and farming, we interpret the mineral reservation in the Act to include substances that are mineral in character (i.e., that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason

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[59] Ch. 9, 39 Stat. 864, 43 U.S.C. § 299 (1970). Sections 1-8 of the Stock-Raising Homestead Act were repealed by Pub. L. 94-579, Title VII, § 702, 90 Stat. 2789.

> to suppose were intended to be included in the surface estate. * * * This interpretation of the mineral reservation best serves the congressional purpose of encouraging the concurrent development of both surface and subsurface resources, for ranching and farming do not ordinarily entail the extraction of mineral substances that can be taken from the soil and that have separate value.

Id. At 53-54. The Court noted its conclusion that gravel was a mineral for purposes of the SRHA was supported by the fact that "gravel has been treated as a mineral under two federal land-grant statutes that, like the SRHA, reserve all minerals to the United States." *Id.* at 56-57.[60]

Recently, the Court distinguished the language in section 9 of the SRHA from the reservation of "all the coal and other valuable minerals" in section 8 of the Pittman Underground Water Act of 1919[61] in deciding that sand and gravel were not included as "other valuable minerals." *Bedroc Limited, LLC v. United States*, 124 S. Ct. 1587, 1592 (2004).

[1] In our view, the language of section 2 of the Small Tract Act cannot meaningfully be distinguished from

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[60] The Court referred to Solicitor's Opinion M-36379 (October 3, 1956), and our decision in *United States v. Isbell Construction Co.*, 4 IBLA 205, 78 I.D. 385 (1971), involving 43 U.S.C. 315g (1970), a provision of the Taylor Grazing Act of 1934.

[61] Ch. 77, 41 Stat. 293, 295.

that of section 9 of the SRHA of 1916, and it should be interpreted the same way. The SRHA was the most recent homestead act when the Congress considered making small tracts available for "little homestead purposes," as Senator McCarran described it, in 1938. There is no indication in the legislative history of the Small Tract Act that Congressional interest in promoting use of both the surface estate and the mineral estate changed between 1916 and 1938.[62]

Persons purchasing small tracts for residence, recreation, business, or community purposes have even less interest than farmers and stockmen in exploiting the mineral resources under their tracts. *See Watt v. Western Nuclear, Inc.*, at 56.[63] As discussed above, since the Act was enacted the Secretary's regulations have protected these purchasers from the destruction of their surface estates by limiting the exercise of the right to prospect for, mine, or remove minerals to leasable minerals. Locatable and salable minerals have not been subject to prospecting or disposition. The sand and gravel in this case have been exploited only

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[62] The Congress had the same interest during its deliberations on the Pittman Act from 1916-1919. *Earl Williams*, 140 IBLA 295, 306-313 (1997). *See* Norman J. Singer, 2B *Statutes and Statutory Construction* 53.05 (6th ed., 2000).

[63] "If we were to interpret the SRHA to convey gravel deposits to the farmers and stockmen who made entries under the Act, we would in effect be saying that Congress intended to make the exploitation of such deposits dependent solely upon the initiative of persons whose interests were known to lie elsewhere. In resolving the ambiguity in the language of the SHRA, we decline to construe that language so as to produce a result at odds with the purposes underlying the statute."

because the successors to the patentees have commercially exploited it rather than occupy and improve the tracts.

When Congress enacted the Small Tract Act in 1938, it was the Department's view that gravel was a locatable mineral under the mining law, *Layman v. Ellis*, 52 L.D. 714 (1929), although that view was contrary to its earlier view. In rewriting the language of the 1938 law in 1954 "for clarity," as Senator Watkins put it, Congress reduced any ambiguity on the question of what mineral deposits might be included under the reservation language by adding the word "all."

Because sand and gravel are mineral in character, *i.e.*, inorganic, can be removed from the soil, can be used for commercial purposes, and there is no reason to suppose the Congress intended them to be included in the surface estate of small tracts, we hold that sand and gravel are included in the reservation of "all other mineral deposits" under the Small Tract Act, 43 U.S.C. § 682a (1970). We do so in accordance with "the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116 (1957).

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's January 3, 2002, decision is affirmed.

/s/ Will A. Irvin

Will A. Irwin
Administrative Judge

I concur:

/s/ C. Randall Grant, Jr.

C. Randall Grant, Jr.
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN DISSENTING;

The issue of whether sand and gravel deposits are minerals reserved under the Small Tract Act is a matter of first impression. The Board and the courts have considered whether sand and gravel are reserved minerals under other legislation. However, the fact that sand and gravel may have been found to be reserved elsewhere does not automatically impel the conclusion that they were reserved under the legislation in the case at hand. *In Western Nuclear, Inc.*, 35 IBLA 146, 85 I.D. 129 (1978), *aff'd., Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983), the Board was called upon to decide whether sand and gravel were included in a reservation of "all the coal and other minerals" in patents issued under the Stock Raising Homestead Act (SRHA), 43 U.S.C. § 299 (2000). In our analysis in *Western Nuclear* we looked to the purposes of the SRHA and held that sand and gravel were reserved. In its decision, the Supreme Court also looked to the purposes of the SRHA in reaching its conclusion that the sand and gravel were reserved when land is conveyed pursuant to the SRHA. The majority finds that the principles established in that case guide the construction of the reservation in the Small Tract Act. I will not say that this interpretation is unfounded, but I must disagree with it.

The SRHA provides for the patent of tracts up to 640 acres in size.[1] The mineral reservation in the SRHA of 1916 was intended to overcome objections to the large acreage to be patented under that act. *See Watt v. Western Nuclear.*

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[1] This is 128 times the size of the largest Small Tract Act parcel allowable.

Inc., 462 U.S. 36, 50 (1983); *United States v. Union Oil Co. of California*, 549 F.2d 1271, 1277 (9th Cir.) *cert. denied*, 434 U.S. 930 (1977).

In *Western Nuclear*, the Court eschewed simplistic definitions in determining the scope of the reservation, noting that the term "minerals" was "used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case." *Watt v. Western Nuclear, Inc.*, *supra*, at 42-43, citing *Northern Pacific Railway Co. v. Soderberg*, 188 U.S. 526, 530 (1903).

There are other reasonable interpretations, however. *In United States v. Isbell Construction Co.*, 4 IBLA 205, 78 I.D. 385 (1971), the Board held that sand and gravel were reserved in patents issued pursuant to 43 U.S.C. § 315g (2000). In *Maurice Tanner*, 141 IBLA 373, 382-83 (1997), we cited *Western Nuclear* when considering whether humate, a soil additive, was a mineral under the SRHA. Of importance, the Supreme Court stated:

> [T]he determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated. As the Court of Appeals for the Ninth Circuit noted in *United States v. Union Oil Co, of California*, 549 F.2d 1271, 1274 [(9th Cir.)], *cert. denied*, 434 U.S. 930 (1977), "[t]he agricultural purpose indicates the nature of the grant Congress intended to provide homesteaders via the Act." *See Pacific Power & Light Co.*, 45 I.B.L.A. 127, 134 (1980) ("Where

> there is a dispute as to whether a mineral resource is included in the [SRHA] reservation, it is helpful to consider the manner in which the material is extracted and used").

Watt v. Western Nuclear, Inc., *supra* at 52 (emphasis added; footnote omitted). When holding that sand and gravel were reserved, the Court found it significant that "gravel can be taken from the soil and used for commercial purposes," *Id.* at 55.

The Court found its conclusion that sand and gravel was a reserved mineral to be "supported by the treatment of gravel under other federal statutes concerning minerals," citing as an example this Board's decision in *United States v. Isbell Construction Co.*, *supra*, in which we held that sand and gravel are reserved in patents issued under the Taylor Grazing Act (TGA). *See Watt v. Western Nuclear, Inc.*, *supra*, at 56-57.

In acts passed after the SRHA, Congress made reservations embracing all minerals a routine feature for patents. Examples include the Taylor Grazing Act, the Small Tract Act, the Recreation and Public Purposes Act of 1926, the Mining Claims Occupancy Act of 1962, and the Public Land Sales Act of 1964. However, the interpretation of what is a mineral has not excluded all substances that can be removed from the soil and used for commercial purposes from conveyances having a mineral reservation. In *Poverty Flats Land & Cattle Co. v. United States*, 788 F.2d 676 (10th Cir. 1986), the court held a reservation of minerals in an exchange patent issued pursuant to the Taylor Grazing Act did not include "caliche," which "consists of small rocks, dust, soil, and sand" around which carbonate salts solidified

to form a matrix. Id. at 677. In *United States v. Hess*, 194 F.3d 1164 (10th Cir. 1999) (*Hess I*), in which the court held that sand and gravel were not reserved under a reservation of minerals in an exchange patent issued under the Indian Reorganization Act, 25 U.S.C. § 463e (2000). On remand, the Federal District Court found that a particular sand and gravel deposit was reserved, and in *United States v. Hess*, 348 F.3d 1237 (10th Cir. 2003) (*Hess II*), the court again held that the sand and gravel was not reserved. In *Hess II*, the court declined to apply the general principle recognized in *Western Nuclear* that land grants are construed favorably to the United States government and that nothing passes except what is conveyed in clear and explicit language. In doing so, the Court emphasized that the patent in *Hess* was an exchange patent and that the surface owners and "the government exchanged properties after seven years of negotiations." 348 F.3d at 1342.[2]

In *Bumpus v. United States*, 325 F.2d 264, 266-67 (10th Cir. 1963), the court applied the maxim "ejusdem generis" and held that sand and gravel were not included in a reservation by a private landowner of "oil, gas and other minerals" in a conveyance to the United States.[3]

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[2] I recognize that good arguments can be advanced for distinguishing the above cited cases. I offer them to demonstrate that the courts do not slavishly apply the definition of "mineral" advanced by the majority, but, rather, the purpose of the act must be closely examined.

[3] In *Western Nuclear*, 35 IBLA at 163-64 n.12, 85 I.D. at 138 n. 12, the Board distinguished the Bumpus holding from the reservation under the SRHA.

In *Earl Williams*, 140 IBLA 295, 303 (1997), we held that sand and gravel were included in a reservation of minerals under the Pittman Underground Water Act of 1919, 43 U.S.C. §§ 351-355 (1958). In that Act, Congress reserved "all the coal and other valuable minerals." The *Williams* decision was reversed by the Supreme Court in BedRoc Limited. LLC. v. United States, 124 S.Ct. 1587 (2004).[4] To illustrate the difficulty of the issue before us, I note that when the Court held 6 to 3 that sand and gravel were not reserved under the Pittman Act, it split three ways. The lead opinion, authored by Chief Justice Rehnquist and joined by Justices O'Conner, Scalia and Kennedy, distinguishes the reservation of "minerals" under the SRHA from the reservation of "valuable minerals" under the Pittman Act on a number of bases. The other five justices did not agree that the reservation under the Pittman Act could be meaningfully distinguished from the reservation in the SRHA. Justices Stevens, Souter, and Ginsburg dissented, asserting that there was no basis for distinguishing *Western Nuclear* from *BedRoc*, and they would have held that *Western Nuclear* governed and that sand and gravel were likewise reserved under the Pittman Act. Justices Thomas and Breyer agreed that the reservations could not be meaningfully distinguished, but they concluded that *Western Nuclear* was incorrect, and its reasoning should not be extended to other

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4 The decision on appeal was issued after the Williams decision but before the Court issued its BedRoc decision. The briefs filed by the parties advanced arguments for and against the application of the *Williams* decision, and, following the issuance of the *BedRoc* decision, the parties to this appeal were provided an opportunity to submit briefs concerning the effect of the Supreme Court's *BedRoc* ruling on this appeal.

laws. Because these two Justices joined the other four Justices who distinguished the Pittman Act from the SRHA, a majority was formed to hold that sand and gravel was not reserved. However, only two of the nine Justices would overturn *Western Nuclear*.

In *BedRoc*, the Court noted that the Pittman Act applied only in Nevada, but that the SRHA applied to any public lands designated as "stock raising lands," 124 S.Ct. at 1592. In BedRoc, the Court found that "Congress has textually narrowed the scope of the term by using the modifier 'valuable.'" 124 S.Ct. at 1593. "We think the term 'valuable' makes clear that Congress did not intend to include sand and gravel in the Pittman Act's mineral reservation." *Id.* "Because the Pittman Act applied only to Nevada, the ultimate question is whether the sand and gravel found in Nevada were commonly regarded as 'valuable minerals' in 1919" when the Pittman Act was enacted. 124 S.Ct. at 1594. The scope of the reservation in the Small Tract Act is not limited by the use of the modifier "valuable," and *BedRoc* does not clearly support the reversal of BLM's decision in *New West*.

The Court further noted; "It is beyond dispute that when the Pittman Act became law in 1919, common sand and gravel could not constitute a valuable mineral deposit" under the General Mining Act, citing *Zimmerman v. Brunson*, 39 L.D. 310 (1910). 124 S.Ct. at 1594. Similarly, in 1959, when the patents were issued to New West's predecessor in interest, common sand and gravel was not a valuable mineral deposit that could be prospected for, mined or removed pursuant to the general mining law.

The Court did not overrule *Western Nuclear*, but declined to extend its reasoning to the Pittman Act. It focused on the distinctions between the SRHA and the Pittman Act. The Pittman Act reserved *valuable* minerals while the SRHA and Small Tract Act reserved minerals without that textual modifier. Finding no ambiguity in the term "valuable minerals" as the Court had found in *Western Nuclear*, the Court in *BedRoc* found no reason to apply the rule that land grants be construed in favor of the government nor any reason to examine the legislative history of the Pittman Act.

Recognizing the merits of New West's argument that *BedRoc* should be read to limit *Western Nuclear* to the SRHA, I am faced with the fact that the Court nevertheless premised its ruling on the term "valuable minerals" in the Pittman Act as distinct from the more general term "minerals" that appears in other legislation. Because the term "minerals" by itself is "used in so many senses, dependent upon the context," see *Western Nuclear, Inc.*, 462 U.S. at 42-43, I strongly adhere to the view that "the determination of whether a particular substance is included in the surface estate or the mineral estate should be made in light of the use of the surface estate that Congress contemplated." 462 U.S. at 52.

The majority opinion gives an excellent presentation of the history of the Small Tract Act, and I find no reason to repeat what they have said. As will be seen, however, I find it appropriate to focus on different aspects of that history than they do.

The Small Tract Act, 43 U.S.C. § 682a, authorized the Secretary in his discretion "to sell or lease * * * a tract

not exceeding five acres of * * * lands * * * which the Secretary may classify as chiefly valuable for residence, recreation, business, or community site purposes, if he finds that such sale or lease of the lands would not unreasonably interfere with the use of water for grazing purposes nor unduly impair the protection of watershed areas * * * ." That was the intent of the Small Tract Act. As quoted in the majority opinion, the Small Tract Act was enacted to provide a means for individual Americans to acquire and for the Federal Government to divest itself of *small* parcels of land that was *not* suitable for agricultural purposes. *See* H. R. Rep. No. 1876, 75th Cong., 2d Sess (Mar. 2, 1938). I find those two aspects of the Small Tract Act represent an important distinction when comparing the Small Tract Act language with that in the Acts clearly intended to dispose of land found suitable for agricultural purposes, such as the SRHA, the Taylor Grazing Act and the Desert Land Entry Act.

The consequences of receiving title to the land when the Federal Government has retained the minerals is also an important consideration. In this case the Government seeks royalties from New West, the company mining the sand and gravel and from JWR, Inc., the successor in interest of the patentee that has entered into an agreement with New West allowing the removal of the sand and gravel. If the minerals are retained, a party seeking to explore for, mine and remove the minerals has the right to do so, even when the surface owner has built a motel or gas station on the tract and the exploration mining and removal of the sand and gravel will completely render the surface of the tract useless for any purposes Congress had contemplated when the act was passed.

The Small Tract Act limits the acreage conveyed under that Act to no more than 5 acres. Unlike the patent issued for a 640-acre stockraising homestead, for example, it is very likely that the mining of a sand and gravel deposit on a Small Tract Act parcel will result in the destruction of the entire surface estate.[5] It is therefore appropriate to revisit the *Isbell* case, the first case in which this Board confronted this concern. After acknowledging that sand and gravel had been deemed to be valuable minerals under the mining law for many years, and "would ordinarily be reserved to the United States," the Board considered "the question of whether the circumstances of this case warrant a finding that this particular deposit was not reserved to the United States, but passed to the patentee." 4 IBLA at 216, 78 I.D. at 390. The Board found:

> The extraction of valuable mineral substances does not deny to the surface patentee the enjoyment of his estate *so long as mining activities do not devour the surface*. 1 American Law of Mining, § 3.26 (Rocky Mountain Mineral Law Foundation). The reservation of minerals to the United States should be construed by considering the purpose of the grant for reservation in terms of the use intended. By applying such a construction, the reservation of minerals should be considered to

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[5] The intent of the Small Tract Act was to permit the purchase of mountain and desert lands that were not suitable for agricultural use or grazing. *See* majority opinion at footnote 9. One could reasonably expect that most of the Small Tract Act parcels contain sand and gravel and little topsoil, if any.

> sever from the surface all mineral substances *which can be taken from the soil and have a separate value.* The majority rule appears to be that it makes no difference whether the particular substance was known to be valuable at the time of severance, or becomes known to be of value as the result of future development of the arts and sciences. Such an approach would exclude nothing that is presently or prospectively valuable as extracted substances. *Id.* However, a minority rule has also developed which emphasizes that the interpretation to be given the term "minerals" is dependent upon popular understanding of what substances are known as minerals at the time of execution of the instrument. *New Mexico & Arizona Land Company* v. *Elkins*, 137 F. Supp. 767 (D.N.M. 1956). *See also*, C. Lindley, A Treatise on the American Law Relating to Mines and Mineral Lands, § 93 (3d ed. 1914).

4 IBLA at 216-17, 78 I.D. at 390-91. The Board then examined a number of cases, specifically referring to *Smith v. Moore*, 474 P.2d 794 (Sup. Ct. Colo. 1970), in which the court held that the reservation of coal did not include the right to destroy the surface in mining it. The Board stated:

While *Smith v. Moore*, supra, deals with the surface mining of coal rather than sand and gravel, it enunciates a theme that is common to all of these decisions; i.e., the concern by the several courts that the grantor, if he prevailed, would have the retained dominion over that which he purportedly conveyed and the grantee would

be deprived of the very substance of his bargain without compensation.

> It is this aspect of the matter which distinguishes all of the foregoing cases from the case at hand. Here the statute under which the conveyance was made, and which provides the authority for the reservation states:
>
> > * * * Where mineral reservations are made by the grantor in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who prospects for or acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the prospecting for, mining and removal of the minerals therefrom, and may mine and remove such minerals, *upon payment to the owner of the surface for damages caused to the land and improvements thereon*. . . . 43 U.S.C. 315g(d). (Emphasis added).
>
> Here the Congress has foreseen the possibility of damage to the surface by reason of the reservation of minerals and has made provision for the owner of the surface to be compensated. This obviates the need for special concern where the mineral in question comprises substantially all of the surface. *See* discussion and cases collected in 1 *Amer. Law of Mining* § 3.51.

> It is noteworthy that Congress also provided a similar indemnity to surface owners of land patented with a mineral reservation pursuant to a stock raising or other homestead entry for surface damages occasional by open pit or strip mining. 30 U.S.C. sec. 54 (1970).

4 IBLA at 221-22, 78 I.D. at 393.

> In our decision in *Western Nuclear*, we also addressed this concern:
>
> > We recognize that there is a significant body of law to the effect that mineral reservations do not include the right to destroy the entire surface in developing the mineral. Such rulings arise from the concern that the grantor would have retained dominion over that which he purportedly conveyed and that the grantee would bee deprived of the very substance of his bargain without compensation. * * * Holding gravel to be a reserved mineral does not deny the holder of a stock-raising homestead patent the substance of his bargain without compensation, because the Act provides for compensation for damages to crops and improvements. In 1949 Congress provided also for compensation for damage to grazing values.

35 IBLA at 162-63, 85 I.D. at 137-38, footnotes omitted. In both *Isbell* and *Western Nuclear*, the provision for compensation provided dispositive evidence of legislative intent to reserve common minerals, whose development would entail destruction of the surface.

In a SOR filed on March 28, 2003, Intervenor JWR, Inc., correctly contends that the Board has "considered as a crucial factor whether the statute in question did or did not provide some protection or compensation to the patentee for the damage of the surface of the patented land." Noting that the Small Tract Act provides no protection, JWR concludes: "Congress could not have intended to reserve sand and gravel from Small Tract Act patents and allow the surface of such land to be consumed without protection or compensation to the surface owner." (JWR SOR, 6.) In its July 9, 2004, Response at 3, New West also voices this concern.

BLM attempts to rebut this argument by pointing to cases in which the "Board has upheld the principle of recognizing a damage to the surface owner component." (July 12, 2004, Response at 24-25.) However, the cases cited by BLM, *e.g. H. E. Hunewill Construction Co., Inc.*, 137 IBLA.101 (1996), involve statutes that specifically provide for surface owner compensation. BLM and the majority overlook the importance the Board placed upon such provisions as evidence of legislative intent to reserve common minerals whose development would entail destruction of the surface. In the Small Tract Act, there is no similar evidence of legislative intent that would support the extension of *Isbell* and *Western Nuclear* to reservations in Small Tract Act patents. It is my opinion that the deposits at issue in this appeal did not fall within the scope of the reservation.

BLM also refers to *Dredge Corporation v. Penny*, 362 F.2d 889 (9th Cir. 1966). In that case the court considered the validity of 16 sand and gravel claims located on land patented under the Small Tract Act.[6] In affirming this Department's decision that the claims were invalid, the court assumed without analysis that sand and gravel were reserved and held that the reserved deposit was not open to location under the general mining laws. Citing 43 CFR 257.15(a) (1954), the court noted that the Secretary had provided that "reserved minerals may be disposed of under the Mineral Leasing Act * * * but that such reserved minerals otherwise are not subject to prospecting or disposition." *Id.* at 890. Unlike the SRHA, the Small Tract Act "does not provide that reserved minerals shall continue to be open to entry and location. Instead it leaves to the Secretary the question of how and to what extent they shall be made available." *Id.* at 890.

In its Answer, BLM argues that removal of certain minerals from the Mining Law does not limit the scope of the mineral reservation, and we have recognized that the laws pertaining to the disposal of minerals do not necessarily

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[6] When considering the validity of a placer claim, the land claimed must be mineral in character. The standard measurement is that each 10-acre subdivision embraced by the claim must be mineral in character. *McCall v. Andrus*, 628 F.2d 1185 (9th Cir. 1980), *cert. denied*, 450 U.S. 996 (1981); *Laden v. Andrus*, 595 F.2d 482, 491 (9th Cir. 1979); *United States v. Oneida Perlite Corp.*, 57 IBLA 167, 88 I.D. 772 (1981); *United States v. Nickol*, 47 IBLA 183, 187 (1980), and cases cited therein. This measurement is twice the size of the Small Tract Act maximum.

define the scope of what is reserved.[7] My reluctance to extend *Western Nuclear* to the Small Tract Act does not arise from any of the changes in the laws relating to the disposal of minerals since the date that the statutes were enacted or the date when the patent was issued. My reluctance is a direct response to what the legislators intended to accomplish when enacting those acts, the land subject to each of them and the protection they provide to the surface owner.

There are a number of important characteristics that distinguish the Small Tract Act from the SRHA. Three are worth mentioning again. The first is the size of the tracts that can be obtained under each act. The second is that Small

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[7] After 1920, oil was no longer subject to the mining law, *see* 30 U.S.C. § 181 (2000) (providing for the leasing of oil), yet it was still held to be reserved under the reservation of "coal and other minerals" under the SRHA. *See Skeen v. Lynch*, 48 F.2d 1044 (10th Cir), *cert denied*, 284 U.S. 633 (1931). In *Union Oil*, the court recognized that geothermal steam was reserved under the SRHA, even though there was no authority for its disposition until the Geothermal Steam Act of 1970. In *Western Nuclear, Inc.*, 35 IBLA at 165, 85 I.D. at 139, we addressed the effect of the Surface Resources Act of 1955, 30 U.S.C. § 611 (2000), provision that common varieties of sand and gravel were no longer subject to location has on mineral reservations. In *Pacific Power & Light*, 45 IBLA 127, 137-38 (1980), *aff'd Pacific Power & Light Co. v. Watt*, No. C 80-073K (D. Wyo. June 17, 1983), we rejected the argument that scoria was no longer reserved under the SRHA because it was no longer subject to disposition under the mining law. Affirming this Board's *Western Nuclear* decision, the Federal District Court noted that mineral estate is a flexible entity which expands with the development of the arts and sciences to include more minerals. *Western Nuclear Inc. v. Andrus*, 475 F. Supp. 654, 663 (D. Wyo. 1979).

Tract Act tracts cannot be suitable for agriculture or grazing, and under the SRHA it must be suitable for those purposes. The third is the lack of a compensation provision in the Small Tract Act. The presence of a compensation provision in the TGA and SRHA was a critical element in our reasoning in *Isbell* and *Western Nuclear*.

Finally, the majority relies heavily on the doctrine "that land grants are to be construed favorable to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *United States v. Union Pacific R. Co.* 353 U.S. 112, 116 (1957). However, the Supreme Court did not apply this principle in *BedRoc* and other courts have expressly declined to apply this principle when the conveyances containing the reservations were not homestead or railroad grants. *E.g.*, *Hess I*, 194 F.3d at 1171: *Hess II*, 348 F.3d at 1243. The Small Tract Act patent is not a grant. It is a conveyance that is purchased.

It is my opinion that the reservation of minerals in the Small Tract Act does not include a reservation of sand and gravel.

Having reached a conclusion contrary to that expressed by the majority regarding the ownership of the sand and gravel, I will express my agreement with them on a related issue. If the retained minerals include sand and gravel, there is no provision in Small Tract Act or the Department's regulations that would permit the prospecting for or the removal of sand and gravel from any parcel patented under the Small Tract Act. When it commenced its trespass action against New West and JWR, BLM specifically advised New West that, if it intended to continue

to mine from the subject land it must begin efforts to enter into a contract with the BLM, for the sale of mineral materials. I agree with the majority when it implied that there is no means by which BLM can enter into a contract for the exploration for or removal of the sand and gravel at New West's pit. New West has no option other than to cease its operations until such time as BLM has promulgated regulations providing for the removal of sand and gravel from lands patented under the Small Tract Act. It matters not that the surface owner is willing to allow the extraction of sand and gravel. The "protection" afforded the surface owners by the lack of regulations which would allow removal of sand and gravel from Small Tract Act parcels without compensation to the surface owner applies to willing as well as unwilling surface owners.

/s/ R.W. Mullen
R.W. Mullen
Administrative Judge

APPENDIX E

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF LAND APPEALS

NEW WEST MATERIALS

IBLA 2002-183R

NEW WEST MATERIALS (ON RECONSIDERATION)

Ordered March 23, 2005

ORDER

New West Materials and JWR, Inc. have petitioned for reconsideration of our decision in *New West Materials*, 164 IBLA 126 (2004), and the Bureau of Land Management has filed an answer to the petition.

We note that the petition is based in part on a misreading of both the 1938 Small Tract Act and our decision. The 1938 Act did not reserve "*all* oil, gas and other mineral deposits," as petitioners state in note 4 of their petition, and we did state that we consider the addition of "all" in the 1954 amendment of the Act "reduced any ambiguity on the question of what mineral deposits might be included under the reservation language." 164 IBLA at 136.

In any event, we do not find the petition offers extraordinary circumstances that warrant reconsideration of our decision. 43 CFR 4.403.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is denied.

/s/ Will A. Irwin
Will A. Irwin
Administrative Judge

I concur:

/s/ C. Randall Grant, Jr.
C. Randall Grant, Jr.
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

When this case was initially before the Board, it was my opinion that the sand and gravel was not retained when the patent to the land was issued under the Small Tract Act, 43 U.S.C. § 682(a) (1970).[1] *See New West Materials* 164 IBLA 126, 138-48 (2004). I continue to believe that the position I took when writing my dissent in that case is correct. For that reason alone, I would grant reconsideration.

The Petition for Reconsideration has raised arguments that were not raised when the case was last before us, and those arguments should be addressed. My colleagues Irwin and Grant have my personal admiration and utmost professional regard. However, neither can walk on water, and, on occasion, both have been wrong. They were wrong in their initial decision, and they have erred again by denying reconsideration.

I respectfully dissent.

/s/ R.W. Mullen
R.W. Mullen
Administrative Judge

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[1] Section 1, Ch. 270, 68 Stat. 239, 43 U.S.C. § 682a (1970), repealed by Pub. L. 94-579, Title VII, § 702, 90 Stat. 2789 (1976).

APPENDIX F

SMALL TRACT ACT

52 Stat. 609 (1938)

To provide for the purchase of public lands for home and other sites.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior, in his discretion, is authorized to sell or lease, to any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such a citizen, as required by the naturalization laws, a tract of not exceeding five acres of any vacant, unreserved, surveyed public land, or surveyed public land withdrawn or reserved by the Secretary of the Interior for any other purposes, or surveyed public land, or surveyed lands withdrawn by Executive Orders Numbered 6910 of November 26, 1934, and 6964 of February 5, 1935, for classification, which the Secretary may classify as chiefly valuable as a home, cabin, camp, health, convalescent, recreational, or business site in reasonably compact form and under such rules and regulations as he may prescribe, at a price to be determined by him, for such use: *Provided*, That no tract shall be sold for less than the cost of making any survey necessary to properly describe the land sold; that no person shall be permitted to purchase more than one tract under the provisions of this Act, except upon a showing of good faith and reasons satisfactory to the Secretary, and that patents for all tracts purchased under the

provisions of this Act shall contain a reservation to the United States of the oil, gas, and other mineral deposits, together with the right to prospect for, mine, and remove the same under such regulations as the Secretary may prescribed[1]: *Provided further*, That this Act shall not apply to any lands in the Territory of Alaska.

Approved, June 1, 1938.

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[1] So in original.

APPENDIX G

SMALL TRACT ACT AMENDMENT

68 Stat. 239 (1954)

To amend the Act entitled "An Act to provide for the purchase of public lands for home and other sites", approved June 1, 1938 (52 Stat. 609), as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to provide for the purchase of public lands for home and other sites", approved June 1, 1938 (52 Stat. 609), as amended by the Act approved July 14, 1945 (59 Stat. 467; 43 U.S.C., sec. 682a), is amended to read as follows:

"That the Secretary of the Interior, in his discretion, is authorized to sell or lease to any person or organization described in section 3 of this Act a tract of not exceeding five acres of any vacant, unreserved public lands, public lands withdrawn by Executive Orders Numbered 6910 of November 26, 1934, and 6964 of February 5, 1935, for classification, or public lands withdrawn or reserved by the Secretary of the Interior for any purposes, which the Secretary may classify as chiefly valuable for residence, recreation, business, or community site purposes, if he finds that such sale or lease of the lands would not unreasonably interfere with the use of water for grazing purposes nor unduly impair the protection of watershed areas, in reasonably compact form and under such rules and regulations as he may prescribe, at a price to be determined

by him, for such use: *Provided*, That no land may be sold hereunder unless it has been surveyed. No person or organization shall be permitted to purchase or lease more than one tract under the provisions of this Act, except upon a showing of good faith and reasons satisfactory to the Secretary.

"SEC. 2. No tract shall be sold for less than the cost of making any survey necessary to describe properly the land sold. Patents for all tracts purchased under the provisions of this Act shall contain a reservation to the United States of the oil, gas, and all other mineral deposits, together with the right to prospect for, mine, and remove the same under applicable law and such regulations as the Secretary may prescribe.

"SEC. 3. A lease may be issued or a sale made under this Act to any of the following: (a) An individual who is a citizen of the United States, or who has filed his declaration of intention to become a citizen as required by the naturalization laws; (b) a partnership or an association, each of the members of which is a citizen of the United States or has filed a declaration of intention to become a citizen; (c) a corporation, including nonprofit corporations, organized under the laws of the United States, or of any State or Territory thereof, and authorized to do business in the State or Territory in which the land is located; (d) a State, Territory, municipality, or other governmental subdivision.

"SEC. 4. Any employee of the Department of the Interior, stationed in Alaska, notwithstanding such employment, may, in the discretion of the Secretary, purchase or lease under this Act one tract for residence or recreation purposes in the Territory of Alaska: *Provided, however,* That any conveyance by the Secretary to such employee shall contain a provision under which said tract

shall revert to the United States if used, within twenty-five years after issuance of patent for such tract, for other than residential or recreation purposes.

"SEC. 5. The authority to lease lands under this Act shall extend to the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands situated in the State of Oregon and under the jurisdiction of the Department of the Interior, except that –

"(a) such lands shall be leased only for residential, recreational, or community site purposes and not for business purposes; and

"(b) no lease of such lands shall be made if such lease would interfere with the application of the sustained yield timber management requirement established with respect to such lands by the Act entitled 'An Act relating to the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands situated in the State of Oregon', approved August 28, 1937 (50 Stat. 874)."

Approved, June 8, 1954.

APPENDIX H

STOCK-RAISING HOMESTEAD ACT OF 1916

39 Stat. 862

[SEC. 9 – RESERVATION OF COAL AND OTHER MINERALS.]

Sec. 9. That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands shall be subject to disposal by the Untied States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this Act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine and remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to eh mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other

tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of th eland, to secure the payment of such damages to the corps or tangible improvements of the entryman or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in from and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the register and receiver of the local land office of the district wherein the land is situate, subject to appeal to the Commissioner of the General Land Office: *Provided*, That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this Act with reference to the disposition, occupancy, and use of the land as permitted to an entryman under this Act.

APPENDIX I

PITTMAN UNDERGROUND WATER ACT OF 1919

41 Stat. 293

[SEC. 8 – RESERVATION OF COAL AND OTHER VALUABLE MINERALS.]

Sec. 8. That all entries made and patents issued under the provisions of this Act shall be subject to and contain a reservation to the United States of all the coal and other valuable minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same. The coal and other valuable mineral deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal and mineral land laws in force at the time of such disposal. Any person qualified to locate and enter the coal or mineral deposits, or having the right to mine and remove the same under the laws of the United States, shall have the right at all times to enter upon the lands entered or patented, as provided by this Act, for the purpose of prospecting for coal or other mineral therein, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops on such lands by reason of such prospecting. Any person who has acquired from the United States the coal or other mineral deposits in any such land, or the right to mine to remove the same. may reenter and occupy so much of the surface thereof as may be required fro all purposes reasonably incident to the mining or removal of the coal or other minerals, first, upon securing the written consent or waiver of the homestead entryman or

patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof, where agreement may be had as to the amount thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entrymen or owner, as may be determined and fixed in an action brought upon the bond or undertaking in a court of competent jurisdiction against the principal and sureties thereon, such bond or undertaking to be in form and in accordance with rules and regulations prescribed by the Secretary of the Interior and to be filed with and approved by the register and receiver of the local land office of the district wherein the land is situate, subject to appeal to the Commissioner of the General Land Office: *Provided*, That all patents issued for the coal or other mineral deposits herein reserved shall contain appropriate notations declaring them to be subject to the provisions of this Act with reference to the disposition, occupancy, and use of the surface of the land.

APPENDIX J

M-36379 October 3, 1956

CONSTRUCTION OF THE MINERAL RESERVATION IN THE ACT OF JUNE 3, 1926 (44 STAT. 690) AS TO DEPOSITS OF SAND AND GRAVEL

Indian Lands: Minerals

Deposits of sand and gravel in lands allotted or patented under the act of June 3, 1926 (44 Stat. 690), which can be shown as of the date of the allotment or patent to have a definite economic value by reason of the existence and nearness of a market in which they can be sold at a profit, are reserved to the Northern Cheyenne Tribe under the mineral reservation provided for in section 3 of the act.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D.C.

M-36379 October 3, 1956

Memorandum

To: Regional Solicitor, Denver Region, Denver, Colorado

From: Solicitor

Subject: Mineral reservations to the Northern Cheyenne Indian Tribe under the act of June 3, 1926 (44 Stat. 690)

This has reference to your teletype of August 1, with respect to the question proposed in your memorandum of November 7, 1955, as to whether sand and gravel are to be regarded as included in the mineral reservation to the Northern Cheyenne Indian Tribe under the act of June 3, 1926 (44 Stat. 690). You have stated that it is your opinion and that of the Acting Field Solicitor at Billings that such mineral reservations "did not include those materials, sand and gravel, and that the Northern Cheyenne allottees owned the sand and gravel and not the Tribe."

In your memorandum you have referred to the brief of authorities prepared by the Acting Field Solicitor at Billings on the question of whether sand and gravel are included in mineral reservations in declarations of taking and deeds of conveyance for fee acquisitions, Missouri River Basin Project. However, since that statement of authorities is concerned only with mineral reservations affecting private

lands acquired in fee by the United States, it is not necessarily conclusive when applied to the allotted Indian lands here being considered.

Section 3 of the act provides in pertinent part as follows:

> "Sec. 3. That the timber, coal or other minerals including oil and gas and other natural deposits, on said reservation are reserved for the benefit of the tribe and may be leased with the consent of the Indian Council under such rules and regulations as the Secretary of the Interior may prescribe; * * *."

The following provision in action 4 of the act is also pertinent to the question under consideration:

> "* * * *Provided further*, That all the income of said tribe from rents, royalties, or other profits accruing from the sale of any timber, coal, or other minerals, including oil, gas, and other natural deposits herein reserved for the benefit of said Indians, including proceeds from the sale of town lots, shall be deposited in the Treasury of the United States to the credit of the Northern Cheyenne Indians and be subject to expenditure for their benefit in such manner as Congress may direct * * *."

The Northern Cheyenne Indian Reservation was set aside from public lands of the United States by Executive Orders dated November 26, 1884 and March 19, 1900, for the use of and occupation of the Tribe. Thus, while the lands were thereafter reserved for the use and benefit of the Tribe, they were still subject to the control of the United States to

the same extent as the lands included in all executive order Indian reservations. This control was exercised by Congress by the act of June 3, 1926, *supra*, wherein it was expressly declared that the lands set aside for this Tribe were "to be the property of said Indians, subject to such control and management of said property as the Congress of the United States may direct." The Congress then proceeded to provide for the allotment of the lands to members of the Tribe subject to the mineral reservations referred to above.

It is apparent from the voluminous legislation enacted by the Congress down through the years with respect to lands of the United States set aside for the use and benefit of the various Indian tribes, whether in satisfaction of treaty obligations or otherwise, that the language and terminology used by Congress has been that normally used in its other legislation governing the use or disposal of the public lands in general. (*Cf.* act of June 18, 1934, as amended, 25 U.S.C. § 463.) For this reason it can reasonably be said that when Congress has legislated with respect to "minerals" in lands reserved to Indian tribes, as here, the legislative concept of the meaning of that term is the same as that intended by the use of the term in other legislation dealing with the lands of the United States. Thus, in enacting the general mining laws of the United States, there was no attempt to define the term "minerals" or to particularize what substances or materials were to be regarded as being within the meaning of that term. However, it is apparent from the language used in the mining laws that Congress had in mind mineral substances having a special *value* rather than those which might or might not fit within an arbitrary definition of the word "minerals." This concept of "value" with respect to the minerals which were to be subject to the provisions of the mining laws is indicated by the references therein to "lands *valuable* for minerals" in H.S.

2318 (30 U.S.C. § 21), and to "all *valuable* mineral deposits" in R.S. 2319 (30 U.S.C. § 22) (emphasis added).

The reasons for the emphasis given in the mining laws to "value" rather than to defining the terms "minerals" is apparent when consideration is given to the fact that what is or what is not a "mineral" is not a static matter of scientific certainty, but is subject to change as new uses are discovered for the many varied mineralized substances found in the earth. In adopting this concept of "value" in the mining laws, Congress can reasonably be presumed to have realized what the Department pointed out in *Holman et al. v. State of Utah*, 41 L.D. 314, *i.e.*, that "in one sense, all land except portions of the top soil is mineral." This fact was referred to by the Court in *Brady v. Smith*, 118 N.Y. 173, 73 N.E. 963, when it observed that the word "mineral," standing by itself, might, under a broad, general, popular definition embrace the soil and all that is found beneath the surface, while under a strict interpretation it might even be limited to metallic substances. *See also, Northern Pacific Railroad Co. v. Soderberg*, 188 U.S. 526, and *Rock House Ford Land Co. v. Raleigh Brick and Tile Co.*, 83 W.Va. 20, 97 S.E. 684.

From the language used in sections 3 and 4 of the act under consideration, it seems clear that the congressional concept of *valuable* minerals, referred to above, was carried into this legislation. The reservation of minerals in section 3 must be read in conjunction with the provisions in section 4 for disposition of the income or profits from the reserved minerals. Thus, it is apparent that Congress intended by section 3 to reserve to the Tribe all minerals having a value separate and apart from the surface estate and from which income or profits might be realized. With respect to non-metallic substances such as sand and gravel such income or profits could be realized only if they were valuable for commercial purposes and located near enough to a market to

provide an economic return. These general principles of "economic value" and "existence of a market" were used by the Department in its administrative determination in 1929 that sand and gravel which could be extracted, removed, and marketed at a profit were "valuable mineral deposits" which could be located and patented under the mining laws. *Layman v. Ellis*, 52 L.D. 714: *Opinion of the Solicitor*, 54 I.D. 294. While this *policy* of the Department was changed by Congress with the act of July 23, 1955 (69 Stat. 367; 30 U.S.C. § 601), with respect to public lands only, certainly it cannot be said that by that act Congress intended to arbitrarily impose a definition of the term "minerals" with respect to Indian lands, to which the act does not apply, which is conclusive as to deposits of sand and gravel affected by its other legislation not related to public lands, regardless of the value those deposits might have.

These concepts of "value" and "existence of a market" have also been long applied by the authorities in construing mineral reservations in grants of private lands (*Lindley on Mines*, 3rd Ed., §93; *Hendler v. Lehigh Valley R. Co.*, 209 Pa. 256, 58 Atl. 486), and it is reasonable to presume that Congress was aware of those general principles at the time it provided for the grants (allotments) of Indian lands here being considered. In any event the fact is that in this instance Congress has clearly indicated in the language of sections 3 and 4 of the act that all minerals having economic value in the market place and from which income or profits could be realized were to be reserved to the Tribe. This intent of Congress can be given affect with respect to deposits of sand and gravel only by adopting the concepts of "economic value" and "existence of a market" which, as indicated above, have heretofore been used and applied to questions involving low-value non-metallic substances on both public and private lands.

It is, therefore, my opinion that deposits of sand and gravel in lands allotted or patented under the act which can be shown as of the date of allotment or patent to have a definite economic value by reason of the existence and nearness of a market in which they can be sold at a profit are reserved to the Tribe under the mineral reservation provided for under section 9 thereof. By this it is not meant to imply that a similar rule would be followed with respect to other minerals having known intrinsic mineral qualities and values. The principles of "economic value" and "existence of a market" would have no application to other than low-value non-metallic mineralized substances such as sand and gravel which are normally found in quantity over widely distributed areas.

The further principle applied to mineral reservations in grants of private lands that materials constituting all or nearly all the surface of the lands granted will not be considered as being within the reservation (*Farrell v. Sayre*, Colo. 1954, 270 F.2d 150; *Stanles v. Young*, I.E. . 135; *Harding v. Faden*, 1 Ch. 276; *Lindley on Mines*, 3rd Ed., § 93); is applicable with equal force to the lands allotted under the act for the reason that Congress must be presumed to have intended that allotments and patents granted thereunder would in fact be affective to transfer valuable surface rights to the allottee and patentees for agricultural and other useful purposes. However, the effectiveness of the act for these purposes would be negated if sand and gravel constituting all or nearly all the surface wars held to be included in the mineral reservation. Cases involving such circumstances must therefore be considered separately so that the intent of Congress with respect to the surface rights of allottees and patentees may be respected.

(Sgd) J. Reuel Armstrong
Solicitor